DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-846	
Title	United States, Petitioner v. Tohono O'odham Nation
Docketed	January 15, 2010
Linked with 09A435	
Lower Ct.	United States Court of Appeals for the Federal Circuit
Case Nos.	(2008-5043)
Decision Date	March 16, 2009
Rehearing Denied	August 18, 2009
Questions Presented	

---Date---	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Nov 6 2009	Application (09A435) to extend the time to file a petition for a writ of certiorari from November 16, 2009 to December 16, 2009, submitted to The Chief Justice.
Nov 9 2009	Application (09A435) granted by The Chief Justice extending the time to file until December 16, 2009.
Dec 4 2009	Application (09A435) to extend further the time to file a petition for a writ of certiorari from December 16, 2009 to January 15, 2010, submitted to The Chief Justice.
Dec 4 2009	Application (09A435) granted by The Chief Justice extending the time to file until January 15, 2010.
Jan 15 2010	Petition for a writ of certiorari filed. (Response due February 16, 2010)
Jan 27 2010	Order extending time to file response to petition to and including March 18, 2010.
Mar 18 2010	Brief of respondent Tohono O'odham Nation in opposition filed.
Mar 31 2010	DISTRIBUTED for Conference of April 16, 2010.
Apr 2 2010	Reply of petitioner United States filed. (Distributed)
Apr 19 2010	Petition GRANTED.
May 6 2010	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including June 29, 2010.
May 6 2010	The time within which to file respondent's brief on the merits is extended to and including August 19, 2010.
May 6 2010	Motion to dispense with printing the joint appendix filed by petitioner United States.
May 24 2010	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Jun 29 2010	Further extension of time within which to file the joint appendix and petitioner's brief on the merits to and including July 1, 2010.
Jun 29 2010	Further extension of time within which to file respondent's brief on the merits to and including August 20, 2010.
Jul 1 2010	Brief of petitioner United States filed.
Jul 7 2010	Brief amicus curiae of Professor Gregory C. Sisk in support of neither party

	filed
Jul 28 2010	Further extension of time to file respondent's brief on the merits to and including August 27, 2010
Aug 16 2010	CIRCULATED
Aug 24 2010	SET FOR ARGUMENT ON Monday, November 1, 2010
Aug 27 2010	Brief of respondent Tohono O'odham Nation filed. (Distributed)
Sep 2 2010	Record received from U S C A. for Federal Circuit (1 box)
Sep 3 2010	Brief amicus curiae of Chamber of Commerce of the United States of America filed. (Distributed)
Sep 3 2010	Brief amici curiae of Colorado River Indian Tribes, et al. filed. (Distributed)
Sep 3 2010	Brief amicus curiae of National Association of Home Builders filed. (Distributed)
Sep 3 2010	Brief amicus curiae of Osage Nation filed. (Distributed)
Sep 7 2010	Justice Kagan is recused in this case.
Sep 27 2010	Reply of petitioner United States filed. (Distributed)
Nov 1 2010	Argued. For petitioner: Anthony A. Yang, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondent: Danielle Spinnelli, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

09-846 JAN 15 2010

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

TOHONO O'ODHAM NATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ELENA KAGAN
Solicitor General
Counsel of Record
IGNACIA S. MORENO
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
AARON P. AVILA
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

HILARY C. TOMPKINS
Solicitor
Department of the Interior
Washington, D.C. 20460

QUESTION PRESENTED

Under 28 U.S.C. 1500, the Court of Federal Claims (CFC) does not have jurisdiction over "any claim for or in respect to which the plaintiff * * * has * * * any suit or process against the United States" or its agents "pending in any other court." The question presented is:

Whether 28 U.S.C. 1500 deprives the CFC of jurisdiction over a claim seeking monetary relief for the government's alleged violation of fiduciary obligations if the plaintiff has another suit pending in federal district court based on substantially the same operative facts, especially when the plaintiff seeks monetary relief or other overlapping relief in the two suits.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provision involved 2
Statement 2
Reasons for granting the petition 13
A. The Federal Circuit's same-relief requirement is inconsistent with the text of Section 1500 and this Court's decision in *Keene* 15
1. Section 1500 precludes CFC jurisdiction when a plaintiff has a second suit pending that is based on substantially the same operative facts as the CFC claim, even if the other suit seeks different relief 15
2. The Tribe did not seek "different relief" in district court because both cases sought monetary relief and other overlapping relief 20
3. The Federal Circuit's interpretation of Section 1500 disregards established jurisdictional and sovereign immunity principles 25
B. The Federal Circuit's decision threatens significant adverse consequences 30
Conclusion 31
Appendix A – Court of appeals opinion (Mar. 16, 2009) 1a
Appendix B – Court of Federal Claims opinion (Dec. 19, 2007) 27a
Appendix C – Court of appeals order (Aug. 18, 2009) 56a
Appendix D – Court of Federal Claims complaint (Dec. 28, 2006) 58a
Appendix E – District court complaint (Dec. 28, 2006) 74a
Appendix F – Chart of lawsuits 94a
Appendix G – Statutory provisions involved 100a

TABLE OF AUTHORITIES

Cases:

Ali v. *Federal Bureau of Prisons*, 552 U.S. 214 (2008) . . . 16
Boyle v. *United States*, 129 S. Ct. 2237 (2009) 16
Casman v. *United States*, 135 Ct. Cl. 647 (1956) 18, 19, 20, 21
Corona Coal Co. v. *United States*, 263 U.S. 537 (1924) 5, 20, 27
Department of the Army v. *Blue Fox, Inc.*, 525 U.S. 255 (1999) 29
Heckler v. *Edwards*, 465 U.S. 870 (1984) 23
Keene Corp. v. *United States*, 508 U.S. 200 (1993) . *passim*
Kosak v. *United States*, 465 U.S. 848 (1984) 16, 17
Lane v. *Pena*, 518 U.S. 187 (1996) 29
Lapides v. *Board of Regents of Univ. Sys. of Ga.*, 535 U.S. 613 (2002) 23
Lehman v. *Nakshian*, 453 U.S. 156 (1981) 29
Library of Cong. v. *Shaw*, 478 U.S. 310 (1986) 29
Loveladies Harbor, Inc. v. *United States*, 27 F.3d 1545 (Fed. Cir. 1994) 5, 10, 12, 18, 20, 28
Matson Navigation Co. v. *United States*, 284 U.S. 352 (1932) 17
Mertens v. *Hewitt Assocs.*, 508 U.S. 248 (1993) 25
Passamaquoddy Tribe v. *United States*, 82 Fed. Cl. 256 (2008) 28
Republic of Iraq v. *Beaty*, 129 S. Ct. 2183 (2009) 16
Shapiro v. *United States*, 168 F. 2d 625 (3d Cir. 1948) . . . 30
Skinner & Eddy Corp., In re, 265 U.S. 86 (1924) 27
Smoot's Case, 82 U.S. (15 Wall.) 36 (1873) 5

Cases—Continued: Page

Tecon Eng'rs, Inc. v. *United States*, 343 F.2d 943 (Ct. Cl. 1965), cert. denied, 382 U.S. 976 (1966) 5, 26
Tempel v. *United States*, 248 U.S. 121 (1918) 29
UNR Indus., Inc. v. *United States*, 962 F.2d 1013 (Fed. Cir. 1992), aff'd *sub nom. Keene Corp.* v. *United States*, 508 U.S. 200 (1993) 5, 18, 26, 28
Union Pac. R.R. v. *United States*, 313 U.S. 450 (1941) .. 16
United States v. *Atlantic Research Corp.*, 551 U.S. 128 (2007) 22
United States v. *Gonzales*, 520 U.S. 1 (1997) 16
United States v. *Mitchell*, 463 U.S. 206 (1983) 2, 3, 29
United States v. *Navajo Nation*, 129 S. Ct. 1547 (2009) 29
United States v. *Sherwood*, 312 U.S. 584 (1941) 29
United States v. *Williams*, 514 U.S. 527 (1995) 29

Statutes:

Act of June 25, 1868, ch. 71, § 8, 15 Stat. 77 3
Act of June 25, 1948, ch. 646, § 1, 62 Stat. 942 3
Employee Retirement Income Security Act of 1974, 29 U.S.C. 1132(a)(5) 25
Indian Claims Commission Act, ch. 959, § 24, 60 Stat. 1055 3
Indian Tucker Act, 28 U.S.C. 1505 3
Judicial Code, ch. 231, § 154, 36 Stat. 1138 (28 U.S.C. 260 (1946)) 3, 27
Little Tucker Act, 28 U.S.C. 1346(a)(2) 30

Statutes—Continued: Page

Tucker Act, ch. 359, 24 Stat. 505 3
28 U.S.C. 1491(a)(1) 3
28 U.S.C. 1491(a)(2) 19
28 U.S.C. 1292(c)(1) 30
28 U.S.C. 1295(a) 30
28 U.S.C. 1295(a)(2) 30
28 U.S.C. 1295(a)(3) 30
28 U.S.C. 1500 ..... *passim*
28 U.S.C. 2680(c) 16

Miscellaneous:

Restatement (Second) of Torts (1979) 22
David Schwartz, *Section 1500 of the Judicial Code And Duplicate Suits Against the Government and Its Agents*, 55 Geo. L.J. (1967) 19
2 Joseph Story, *Commentaries on Equity Jurisprudence* (1918) 22
Webster's Third New Int'l Dictionary (1993) 16, 17

In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

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TOHONO O'ODHAM NATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-26a) is reported at 559 F.3d 1284. The opinion of the Court of Federal Claims (App., *infra*, 27a-55a) is reported at 79 Fed. Cl. 645.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 2009. A petition for rehearing was denied on August 18, 2009 (App., *infra*, 56a). On November 9, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including

December 16, 2009. On December 4, 2009, the Chief Justice further extended the time to January 15, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 1500 of Title 28 of the United States Code provides:

> The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

STATEMENT

1. a. In 1855, Congress established the Court of Claims with limited authority to hear claims against the United States, report its findings to Congress, and, where appropriate, recommend enactment of a private bill to provide the claimant with monetary relief. *United States* v. *Mitchell*, 463 U.S. 206, 212-213 (1983). Because that limited authority did not sufficiently relieve Congress of the burdens of the private-bill process, Congress, in 1863, adopted President Lincoln's recommendation and authorized the Court of Claims to issue final judgments. *Id.* at 213. In 1866, Congress enabled the Court of Claims to exercise full judicial power by repealing a provision that had allowed the Secretary of the Treasury to prevent complete execution of the court's judgments. *Id.* at 213 n.12.

Two years later, in 1868, Congress enacted a provision prohibiting the Court of Claims from exercising jurisdiction over "any claim * * * for or in respect to which" the plaintiff "has pending any suit or process in any other court" against an agent of the United States. See Act of June 25, 1868, ch. 71, § 8, 15 Stat. 77; see *Keene Corp.* v. *United States*, 508 U.S. 200, 205-207 (1993). Congress later reenacted that jurisdiction-limiting statute in 1874 as Section 1067 of the Revised Statutes and in 1911 as Section 154 of the Judicial Code, ch. 231, § 154, 36 Stat. 1138 (28 U.S.C. 260 (1946)). See *Keene*, 508 U.S. at 206-207. In 1948, when Congress again reenacted the statute and moved it to its current location at 28 U.S.C. 1500, Congress expanded the statute's scope to preclude Court of Claims jurisdiction if the plaintiff's related suit in another court is "against [either] the United States" or its agent. See Act of June 25, 1948, ch. 646, § 1, 62 Stat. 942; *Keene*, 508 U.S. at 211 n.5. Every modern-day statute conferring jurisdiction on the Court of Claims and its trial-court successor, the United States Court of Federal Claims (CFC)[1]—including the Tucker Act, 28 U.S.C. 1491(a)(1), and the Indian Tucker Act, 28 U.S.C. 1505, on which respondent rests CFC jurisdiction in this case (App., *infra*, 60a)—has been enacted against the backdrop of the jurisdictional limitation embodied in Section 1500 and its predecessors. See Tucker Act, ch. 359, 24 Stat. 505 (enacted 1887); Indian Claims Commission Act, ch. 959, § 24, 60 Stat. 1055 (enacted 1946).

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[1] In 1982, Congress transferred the appellate and trial functions of the Court of Claims to the Court of Appeals for the Federal Circuit and the United States Claims Court, respectively. In 1992, the Claims Court was renamed as the CFC. See *Keene*, 508 U.S. at 202 n.1; *Mitchell*, 463 U.S. at 228 n.33.

b. Section 1500 provides that the CFC shall not have jurisdiction of "any claim for or in respect to which" the plaintiff has "any suit or process" against the United States or an agent thereof "pending in any other court." 28 U.S.C. 1500. In *Keene*, this Court explained that Section 1500's prohibition on CFC jurisdiction over a claim "for or in respect to which" the plaintiff has a pending suit "requires a comparison between the claims raised in the [CFC] and in the other lawsuit." 508 U.S. at 210. The Court also reasoned that Congress's use of the disjunctive "or" in the phrase "for or in respect to which" demonstrates that Section 1500 bars CFC jurisdiction "not only as to claims 'for . . . which' the plaintiff has sued in another court," but also "as to those [CFC claims] 'in respect to which' he has sued elsewhere." *Id.* at 213. The latter restriction, *Keene* concluded, "make[s] it clear that Congress did not intend the statute to be rendered useless by a narrow concept of identity" of the CFC claim and the other lawsuit, which would mistakenly allow a "liberal opportunity to maintain two suits arising from the same factual foundation." *Ibid.*

Keene ultimately held that Section 1500 requires dismissal of a CFC claim when "the plaintiff's other suit [is] based on substantially the same operative facts as the [CFC] action," "at least" if there is "some overlap in the relief requested." 508 U.S. at 212. Dismissal is required, the Court held, even if the other action is "based on [a] different legal theor[y]" that could not "have been pleaded" in the CFC. *Id.* at 212-214. And although observing that Section 1500 has been criticized as "anachronistic" and acknowledging that Section 1500's jurisdictional restrictions may "deprive plaintiffs of an opportunity to assert rights," the Court in *Keene* concluded that

the courts "enjoy no 'liberty to add an exception . . . to remove apparent hardship.'" *Id.* at 217-218 (quoting *Corona Coal Co.* v. *United States*, 263 U.S. 537, 540 (1924)). Such concerns, *Keene* explained, must be directed to "Congress, for [it is] that branch of the government" that has "the constitutional authority to define the jurisdiction of the lower federal courts" and that has "limited the jurisdiction of the Court of Claims" in Section 1500. *Id.* at 207, 217-218 & n.14 (quoting *Smoot's Case*, 82 U.S. (15 Wall.) 36, 45 (1873)).

Keene reserved two questions concerning "judicially created exceptions" to Section 1500 that are relevant to the present petition. See 508 U.S. at 216 (quoting *UNR Indus., Inc.* v. *United States*, 962 F.2d 1013, 1021 (Fed. Cir. 1992) (en banc), aff'd *sub nom. Keene*, *supra*). Specifically, the Court reserved the questions whether Section 1500's prohibition on CFC jurisdiction is subject to any exception when (1) the action in another court based on the same operative facts seeks "completely different relief," *id.* at 212 n.6, 214 n.9, 216 (discussing *Casman* v. *United States*, 135 Ct. Cl. 647 (1956)), or (2) the plaintiff files his CFC claim first, before filing the related suit in another court. *Id.* at 209 n.4, 216 (discussing *Tecon Eng'rs, Inc.* v. *United States*, 343 F.2d 943 (Ct. Cl. 1965), cert. denied, 382 U.S. 976 (1966)). The en banc Federal Circuit had rejected both of those judicially created exceptions when this Court decided *Keene*, see *UNR Indus.*, 962 F.2d at 1020, 1024-1025 (purporting to overrule *Casman*); *id.* at 1020, 1023 (purporting to overrule *Tecon*), but the Federal Circuit has since stated that the pertinent portions of *UNR Industries* were non-binding dicta, and that the exceptions recognized in *Casman* and *Tecon* remain good law. See *Loveladies Harbor, Inc.* v. *United States*, 27 F.3d 1545, 1549, 1551

(Fed. Cir. 1994) (en banc) (*Casman*); App., *infra*, 16a-17a (*Tecon*).

2. On December 28, 2006, the Tohono O'odham Nation (Tribe) filed a complaint against the United States in the District Court for the District of Columbia. App., *infra*, 74a-93a. One day later, it filed a similar complaint against the United States in the CFC. App., *infra*, 58a-73a.

a. The Tribe's district court complaint initiated "an action to seek redress of breaches of trust by the United States * * * in the management and accounting of [the Tribe's] trust assets." App., *infra*, 74a-75a. The complaint states that those assets include the Tribe's reservation lands, mineral resources, and associated income held for it in trust by the United States, as well as funds owed by the United States to the Tribe under court judgments. *Id.* at 79a-80a. The complaint asserts that the United States owes "fiduciary obligations to the [Tribe] with respect to the management and administration of the [Tribe's] trust funds and other trust assets" that are "rooted in and derive from numerous statutes and regulations." *Id.* at 79a, 81a (citing illustrative provisions). "The statutes, regulations, and executive orders giving rise to the United States' fiduciary duties," it asserts, "provide the 'general contours' of those duties" and "specific details are filled in through reference to general trust law." *Id.* at 82a (citation omitted).

More specifically, the district court complaint alleges that the government, *inter alia*, failed "to provide an adequate accounting of the trust assets" and failed both to "collect" and to "invest" trust funds "in compliance with [its] fiduciary responsibilities and other federal statutory and regulatory law." App., *infra*, 76a. It thus alleges numerous "breaches of trust [that] include, but

are not limited to," the failure to preserve records and provide a proper "accounting of trust property" and failures to "deposit trust funds," take reasonable steps "to preserve and protect trust property," and "refrain from self-dealing." *Id.* at 83a-84a. The complaint further alleges that the government breached a duty to manage the property held in trust "to produce a maximum return to the [Tribe]" by "invest[ing]" such funds properly and "maximiz[ing] profits" therefrom. *Id.* at 76a, 84a; see *id.* at 83a (duty to "invest" and "maximize" assets); *id.* at 86a (statutory investment duty).

Count 1 asserts that the government has "failed to fulfill [its] fiduciary obligations," which include, "*inter alia*," the duty to provide a proper "accounting of the [Tribe's] trust assets." App., *infra*, 89a-90a. Count 1 also requests a declaration that both defines "the [government's] fiduciary duties" and finds them to have been breached. *Ibid.* Count 2 asserts a "continuing pattern" of breaches of "fiduciary duties" and seeks an injunction directing both the completion of a proper accounting and compliance with "all other fiduciary duties." *Id.* at 91a. Count 2 clarifies that the Tribe requests a "complete accounting" that is "not limited to" the "funds under the custody and control of the United States," and adds that, based on the results of that "complete accounting," the Tribe seeks "restatement of [its] trust fund account balances" and "any additional equitable relief," such as "disgorgement" and "equitable restitution," that "may be appropriate." *Ibid.*; see *id.* at 92a. Finally, the Tribe's prayer for relief in district court restates the relief requested in Counts 1 and 2 and adds a general plea "[f]or such other and further relief as the Court, * * * sitting in equity, may deem just and proper." *Id.* at 91-93a.

b. The Tribe's CFC complaint initiated "an action for money damages against the United States" for its alleged "mismanagement of the [Tribe's] trust property" through "breaches of statutory, regulatory, and fiduciary duties owed to the [Tribe]." App., *infra*, 58a-59a. The complaint specifies that the asserted duties pertain to the Tribe's reservation lands, mineral resources, and associated income held by the United States, as well as funds owed to the Tribe by the United States under court judgments. *Id.* at 60a-62a. The complaint, like its district court counterpart, contends that the government owes "fiduciary obligations" to the Tribe with respect to its "management and control of the [Tribe's] tribal assets" that are "rooted in and derive from a number of statutes, regulations and executive orders." *Id.* at 62a-63a (citing illustrative provisions). "The statutes, regulations, and executive orders giving rise to the United States' fiduciary duties," it adds, "provide the 'general contours' of those duties," and "the details are filled in through reference to general trust law." *Id.* at 64a (citation omitted).

Like the district court complaint, the CFC complaint alleges several "fiduciary duties" and breaches by the government, including the failure to "[f]urnish complete and accurate information to the [Tribe] as to the nature and amount of trust assets" by "performing a [proper] accounting of all the trust property." App., *infra*, 65a-66a (¶¶ 22.d, 23.d). It further alleges breaches of duties to keep "accurate information," "properly administer the trust," "collect and deposit the trust funds," "preserve the trust assets," and "refrain from self-dealing." *Id.* at 66a-67a. And, like the district court complaint, it alleges the breach of a duty to "invest" funds held by the

government in trust "to maximize [its] productivity" for the Tribe. *Id.* at 67a; see *id.* at 70a-72a.

Counts 1 through 3 each invoke the government's alleged failure to perform a proper accounting, and assert that the Tribe was damaged by the government's alleged failure to properly manage the Tribe's mineral estate (Count 1), non-mineral estate (Count 2), and judgment funds (Count 3). App., *infra*, 67a-71a. Those breaches allegedly include failures, *inter alia*, "to collect" appropriate compensation for leased lands and property rights, "to lease" such assets at fair market value, and "to invest" properly the Tribe's "judgment funds" and other "trust funds." *Ibid.* Count 4 asserts injury caused by alleged governmental failures to properly invest tribal trust funds. *Id.* at 71a-72a. The complaint's prayer for relief seeks, *inter alia*, damages for the government's "breaches of fiduciary duty" and "such other and further relief as the Court deems just and appropriate." *Id.* at 72a-73a.

3. The CFC granted the government's motion to dismiss, holding that it was without jurisdiction under Section 1500. App., *infra*, 27a-55a.

After comparing the district court and CFC complaints with a side-by-side table detailing their allegations, App., *infra*, 33a-38a, the court explained that the "complaints clearly involve the same parties, the same trust corpus, the same asserted trust obligations, and the same asserted breaches of trust over the same period of time." *Id.* at 39a. The CFC added that, although the district court complaint has an "apparent emphasis" on an accounting, it also seeks equitable monetary relief in the form of a restatement of accounts, disgorgement, and restitution. *Id.* at 39a, 42a. The CFC complaint, in turn, "although focusing on money damages," seeks re-

lief that "will require an accounting [by the government] in aid of judgment." *Id.* at 39a, 41a, 55a. And, in both cases, the court explained, "[t]he underlying facts are the same" for "all practical purposes." *Id.* at 48a-49a. In these circumstances, the court found it "obvious that there is virtually 100 percent overlap" between the two cases. *Id.* at 49a. The court accordingly held that, given the "substantial overlap in the operative facts" and "in the relief requested," Section 1500 required dismissal without prejudice for want of jurisdiction. *Id.* at 55a.

In so holding, the court rejected the Tribe's contention that Section 1500 was inapplicable because the Tribe's request for equitable monetary relief in district court was "different" from its request for damages in the CFC. App., *infra*, 49a-54a. The CFC explained that a plaintiff's "legal theory" is immaterial under Section 1500 and, in any event, an Indian breach-of-trust claim in the CFC is in substance "an equitable proceeding that produces a monetary remedy." *Id.* at 49a-50a, 53a-54a. What is "relevant" in this context, the CFC held, "is the form of relief"—that is, "money." *Id.* at 54a.

4. A divided panel of the Federal Circuit reversed and remanded. App., *infra*, 1a-26a.

a. The majority interpreted its post-*Keene* en banc decision in *Loveladies*, as holding that Section 1500's jurisdictional bar applies only if the plaintiff's claim in the CFC both "arise[s] from *the same operative facts*" and "seek[s] *the same relief*" as a "claim pending in another court." App., *infra*, 7a (quoting *Loveladies*, 27 F.3d at 1551); see *id.* at 8a-9a. It accordingly concluded that Section 1500 "does not divest the [CFC] of jurisdiction" if the plaintiff's action in another court seeks "'different' relief," even though the cases may "arise from the same operative facts." *Id.* at 8a-9a. The majority

then found that "the 'same relief' prong is dispositive," and therefore declined to decide whether the Tribe's lawsuits "arise from the same operative facts." *Id.* at 9a & n.1.

The majority reasoned that the two suits do not seek the "same relief" because the Tribe's CFC complaint "seeks damages at law, not equitable relief," whereas its district court complaint "requests only equitable relief and not damages." App., *infra*, 11a-12a. Although the majority recognized that the "equitable" relief sought in district court would, if granted, recover "money * * * in the government's possession," *id.* at 13a, it found "[t]he [Tribe's] careful separation of equitable relief and money damages" to be "critical to the § 1500 analysis in this case." *Id.* at 12a.

The majority disagreed with the CFC's conclusion that the Tribe's lawsuits sought "overlapping relief" in two areas: "money and an accounting." App., *infra*, 12a. First, the majority concluded that the actions do not seek overlapping monetary relief. *Id.* at 12a-15a. It reasoned that the Tribe's district court complaint seeks only what the court labeled "equitable 'old money' relief"—*i.e.*, "money that is already in the government's possession, but that erroneously does not appear in the [Tribe's] accounts" and "balance sheet[s]." *Id.* at 13a-14a. The majority found that the CFC complaint, in contrast, seeks money damages for what the court labeled "'new money' that the [Tribe] should have earned as profit but did not" because the United States allegedly "fail[ed] to properly manage the [Tribe's] assets to obtain the maximum value." *Ibid.*

The majority similarly found that the Tribe sought an "accounting" in district court but not in the CFC. App., *infra*, 15a. The court recognized that "what would

ensue [in the CFC] would amount to an accounting" in aid of the CFC's ability to enter judgment, but noted that the Tribe's "prayer for relief" in its CFC complaint "does not request an accounting." *Ibid.*

Finally, the majority rejected the argument that its ruling would undermine Section 1500's policy and purpose of relieving the United States from the burden of defending the same claims at the same time in different courts. App., *infra*, 15a. It concluded that such arguments "ring[] hollow" because, under Federal Circuit precedent, Section 1500 "does not actually prevent a plaintiff from filing two actions seeking the same relief for the same claims." *Id.* at 16a-17a. Rather, the court reasoned, Section 1500 only prohibits plaintiffs from filing a district court action before a CFC lawsuit, while permitting plaintiffs to proceed with both lawsuits so long as the CFC action is filed first. *Ibid.* On that view, the majority concluded that Section 1500 "functions as nothing more than a 'jurisdictional dance,'" and it accordingly "found [no] purpose that § 1500 serves today." *Id.* at 17a. The majority also expressed the view that it would not be "sound policy" to read Section 1500 to preclude damage actions in the CFC when plaintiffs challenge the same governmental action in other courts because "[t]he nation is served by private litigation which accomplishes public ends" and "relies in significant degree on litigation to control the excesses [of] Government." *Ibid.* (quoting *Loveladies*, 27 F.3d at 1555-1556).

b. Judge Moore, in dissent, explained that the Tribe's suits "were based on substantially the same operative facts and that the two complaints included some overlap in the relief requested." App., *infra*, 19a-20a. She accordingly concluded that this Court's decision in

Keene required that the CFC action be dismissed under Section 1500. *Ibid.*

REASONS FOR GRANTING THE PETITION

The Federal Circuit's decision holds that Section 1500, which deprives the CFC of jurisdiction over "any claim for or in respect to which" the plaintiff has "any suit or process" against the United States pending in any other court, permits plaintiffs to maintain simultaneous actions against the United States in two courts arising from the same operative facts so long as the actions do not seek the "same relief." It further holds that parallel requests for monetary relief are sufficiently "different" under that jurisdictional test if the monetary relief is deemed "legal" relief in one action and "equitable" relief in the other. The court's decision finds no support in the broad text of Section 1500's prohibition on CFC jurisdiction; its reasoning is inconsistent with this Court's interpretation of Section 1500 in *Keene Corp.* v. *United States*, 508 U.S. 200 (1993); and it resolves incorrectly important questions on which *Keene* reserved decision.

The Federal Circuit has itself changed course on the key questions concerning the proper interpretation of Section 1500, and its decision in this case will have significant adverse impact. The decision will force the government to litigate simultaneously against the same plaintiff in several fora concerning the same questions, thereby wasting significant judicial and litigation resources and risking inconsistent decisions. Indeed, in the Indian Tucker Act context alone, Tribes have brought more than 30 pairs of so-called tribal-trust lawsuits against the United States and are simultaneously

litigating those paired cases in both the CFC and district court.

The Federal Circuit stated that Section 1500 no longer serves "any purpose" because, under its interpretations, Section 1500 requires only a pointless "jurisdictional dance" and enables plaintiffs suing the federal sovereign to easily circumvent its restrictions. App., *infra*, 17a. In so saying, the court of appeals got one thing right: Its post-*Keene* rulings have indeed reduced Section 1500 to an easily evaded, formal requirement. But that conclusion should have suggested to the Federal Circuit not that it disregard what it had left standing of Section 1500's jurisdictional restrictions, but that it revisit its own interpretations. Since 1868, Section 1500's jurisdictional restrictions have served as part of the legal framework for every waiver by the United States of its sovereign immunity from suit in the CFC. Congress itself *expanded* Section 1500's jurisdictional bar in 1948; efforts to repeal the provision have failed; and, as *Keene* emphasized, Section 1500's "limits upon federal jurisdiction . . . must be neither disregarded nor evaded." *Keene*, 508 U.S. at 207, 211 n.5, 217 & n.14. To the contrary, such express limitations on the scope of Congress's waivers of the United States' immunity from suit in the CFC must be strictly observed, with any ambiguity construed in favor of preserving that immunity.

The Federal Circuit's decision departs from those basic interpretive principles, greatly expands the jurisdiction of the CFC, disregards the basic teachings of this Court in *Keene*, and imposes the burden of duplicative litigation on the parties and the CFC. The Court should grant certiorari to correct the fundamental errors of the court of appeals and restore the jurisdictional limitations Congress enacted.

A. The Federal Circuit's Same-Relief Requirement Is Inconsistent With The Text Of Section 1500 And This Court's Decision In *Keene*

1. Section 1500 precludes CFC jurisdiction when a plaintiff has a second suit pending that is based on substantially the same operative facts as the CFC claim, even if the other suit seeks different relief

The court of appeals erroneously held that Section 1500's jurisdictional bar does not apply when a plaintiff who has sued the United States in the CFC has a related case based on the same operative facts pending in another court, so long as that other suit seeks "different relief." App., *infra*, 7a, 8a-9a.[2] Section 1500, by its terms, bars CFC jurisdiction over "any" claim "in respect to which" the plaintiff has "any suit" pending in another court. 28 U.S.C. 1500. A suit sharing the same operative facts as a CFC claim is such a suit.

a. Congress has broadly proscribed CFC jurisdiction over any claim against the United States for which a plaintiff has a related suit against the government pending in another court, regardless whether that other case seeks the "same relief" as the CFC claim. The phrase "any claim [in the CFC] for or in respect to which the plaintiff * * * has pending * * * any suit or process," 28 U.S.C. 1500, uses the word "which" to refer to the plaintiff's CFC claim. Section 1500's jurisdictional bar therefore is triggered by "any suit or process" "for or in respect to" the plaintiff's CFC claim, when that suit or process is pending against the United

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[2] The court of appeals accepted *arguendo* the CFC's determination that the "operative facts" in the Tribe's two complaints "are the same," App., *infra*, 48a-49a, by concluding that it need not address whether the complaints arise from the "same operative facts." *Id.* at 9a n.1.

States in another court. *Keene* makes clear that that bar prohibits CFC jurisdiction "not only as to claims 'for . . . which' the plaintiff has sued in another court," but also "as to those 'in respect to which' he has sued elsewhere." 508 U.S. at 213. And the expansive text of the latter phrase eschews a "narrow concept of identity." See *ibid.*

A plaintiff's pending suit in another court is "in respect to" a claim in the CFC if it "relate[s] to," is "concern[ed] with," or has some "relation or reference to" that claim. *Webster's Third New Int'l Dictionary* 1934 (1993) (defining "respect" and "in respect to"). That reading is supported by this Court's conclusion that "the plain language" of a similar statutory phrase ("arising in respect of") is "encompassing" language that "sweep[s] within" its scope all related matters "associated in any way." *Kosak* v. *United States*, 465 U.S. 848, 854 (1984) (interpreting 28 U.S.C. 2680(c)); cf. *Union Pac. R.R.* v. *United States*, 313 U.S. 450, 464 (1941) (concluding that concessions "in respect to the transportation" of property include concessions that either "directly or indirectly" affect the cost of such transportation).

Congress further underscored Section 1500's breadth by emphasizing that its jurisdictional bar is triggered by "*any* suit or process." 28 U.S.C. 1500 (emphasis added). "The term 'any' ensures that the [phrase 'any suit or process'] has a wide reach," *Boyle* v. *United States*, 129 S. Ct. 2237, 2243 (2009), and Section 1500 thereby gives "no warrant to limit the class of" related suits that preclude CFC jurisdiction, *Republic of Iraq* v. *Beaty*, 129 S. Ct. 2183, 2189 (2009). See *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) ("[T]he word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (quoting *United States* v. *Gonzales*,

520 U.S. 1, 5 (1997)). A suit that "aris[es] from the same factual foundation" as a claim in the CFC, *Keene*, 508 U.S. at 213, surely qualifies as a suit that "relate[s] to," is "concern[ed] with," or has some "relation or reference to" that claim, *Webster's Third New Int'l Dictionary* 1934, or as one that is "associated in any way" with the CFC claim, *Kosak*, 465 U.S. at 854.

b. Section 1500's broad gatekeeping function reinforces that conclusion. Before 1948, the predecessor to Section 1500 required only "an election between a suit in the Court of Claims [against the United States] and one brought in another court against an *agent* of the government." *Matson Navigation Co.* v. *United States*, 284 U.S. 352, 356 (1932) (emphasis added). Congress expanded the jurisdictional bar when it enacted Section 1500, which applies when a CFC plaintiff has a related suit in another court against either the United States or one of its agents. See *Keene*, 508 U.S. at 211 n.5. Congress accordingly "close[d] th[e] loophole" that permitted plaintiffs to maintain two related suits brought against the United States directly. *Ibid.*

In both contexts, Section 1500 bars CFC jurisdiction even in circumstances in which the CFC action and another pending suit involve claims that could not have been "joined in a single suit." *Keene*, 508 U.S. at 213. A suit in district court arising from the same factual foundation can therefore qualify as a suit "in respect to" the plaintiff's CFC claim even though its request for district court relief "rest[s] on a legal theory that could [not] have been pleaded" in or that lies "beyond the jurisdiction of the [CFC]." See *id.* at 213-214. It follows that Congress required plaintiffs to elect between fora in which they can have different prospects of successfully securing relief. The Court in *Keene* did not need to de-

cide whether Section 1500 applies when two suits seek "completely different relief" because "at least" some overlapping relief was sought in that case. *Id.* at 212 & n.6. But the Federal Circuit's holding that CFC jurisdiction is displaced only when another suit seeks the "same relief" in another forum ultimately cannot be reconciled with the logic of *Keene*'s holding that Section 1500 applies even when the plaintiff's legal theories in the two cases are so different that the theory relied upon in district court could not appropriately be advanced in the CFC.

c. The Federal Circuit's extra-textual "same relief" exception to Section 1500's categorical bar likewise finds no sound basis in *Casman* v. *United States*, 135 Ct. Cl. 647 (1956), which the en banc Federal Circuit initially repudiated in considered dicta in *UNR Industries, Inc.* v. *United States*, 962 F.2d 1013, 1020, 1024-1025 (1992), aff'd *sub nom. Keene*, *supra*, but later reaffirmed, see *Loveladies Harbor, Inc.* v. *United States*, 27 F.3d 1545, 1549, 1551 (Fed. Cir. 1994) (en banc). *Casman* reasoned that Section 1500's purpose was "to require an election between a suit in the Court of Claims and one brought in another court," and concluded that the statute therefore should not apply if the "plaintiff has no right to elect between two courts." 135 Ct. Cl. at 649-650. Because Casman's request for back pay fell "exclusively within the [Court of Claims'] jurisdiction," and because the Court of Claims (at the time) lacked "jurisdiction to" grant Casman's request for specific relief "restor[ing] [him] to his [federal] position," the Court of Claims held in *Casman* that Section 1500 did not apply when such

"entirely different" relief must be sought in different courts. *Ibid.*[3]

Casman's focus on the type of relief sought by the plaintiff in a suit in another court finds no textual foundation. A suit seeking specific relief rather than monetary relief is nevertheless a "suit or process." And although the suit may not be "for" the CFC claim under Section 1500, it qualifies as a suit "in respect to" that claim if it arises from substantially the same operative facts. A leading commentary on Section 1500 has thus concluded that the court in *Casman* "overr[ode] the words of the section." David Schwartz, *Section 1500 of the Judicial Code And Duplicate Suits Against the Government and its Agents*, 55 Geo. L.J. 573, 587 (1967).

And although *Keene* reserved the question whether *Casman*'s "'judicially created exception[]' to § 1500" for suits seeking "completely different" or "distinctly different" relief was valid, 508 U.S. at 212 n.6, 215-216 (citation omitted), the Court's reasoning demonstrates that *Casman* relied on a fundamentally flawed rationale and incorrectly restricted Section 1500. As noted above, *Keene* holds that Section 1500 requires plaintiffs to elect between suing in the CFC and suing in another court even when the legal theories that could be raised in such suits are distinct. See 508 U.S. at 213-214. Those differences in legal theory typically would result in differences in the judicial relief that the plaintiff would ultimately be able to secure. Requiring a plaintiff to elect between a CFC claim and a factually related suit seeking "different relief" therefore is not materially differ-

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[3] In 1982, Congress eliminated the problem that concerned the *Casman* court by authorizing federal employees to seek both back pay and reinstatement in the CFC. See 28 U.S.C. 1491(a)(2).

ent from requiring the plaintiff to make the election at issue in *Keene*.

Keene recognized that Section 1500's restrictions may "deprive plaintiffs of an opportunity to assert rights that Congress has generally made available" and emphasized that only Congress—not the courts—may remove such "apparent hardship" through new legislation. *Id.* at 217-218 (quoting *Corona Coal Co.* v. *United States*, 263 U.S. 537, 540 (1924)). At the time, the en banc Federal Circuit, in the very decision under review, had "announced that it was overruling" *Casman*. See *Keene*, 508 U.S. at 212 n.6, 215-216 (citation omitted) (discussing *UNR Indus.*, *supra*). Now that the Federal Circuit has reinstated the *Casman* holding, *Loveladies*, 27 F.3d at 1549, 1551, and applied it in this case, see App., *infra*, 7a, this Court's review is again necessary.

2. The Tribe did not seek "different relief" in district court because both cases sought monetary relief and other overlapping relief

Even if *Casman* were correct in concluding that Section 1500 does not preclude simultaneous suits if they seek "entirely different" relief, *Casman*, 135 Ct. Cl. at 650, the Federal Circuit erred in holding that the Tribe's requests for monetary relief in the CFC and district court qualify as different relief. The court of appeals' conclusion that identifying and distinguishing the legal or equitable bases for such relief is "critical to the § 1500 analysis," App., *infra*, 12a, is both incorrect and inconsistent with *Keene*.

a. *Keene* held that Section 1500 requires dismissal of a CFC claim if "the plaintiff's other suit [is] based on substantially the same operative facts as the [CFC] action, at least if there [is] some overlap in the relief re-

quested." 508 U.S. at 212. The Court thereby acknowledged the *Casman*-based argument that suits based on substantially the same facts might not trigger Section 1500 if they seek "completely different relief"—*i.e.*, "distinctly different types of relief." *Id.* at 212 n.6, 216; *id.* at 214 n.9 (emphasizing that *Casman* is "limited to that situation"). *Casman*, as noted, concluded that the specific (injunctive) relief of reinstatement available in district court and the monetary relief available in the Court of Claims were "entirely different." 135 Ct. Cl. at 650. *Keene* accordingly held that *Casman*'s exception, even if valid, was inapplicable because Keene sought "monetary relief" in both the CFC and the district court actions. 508 U.S. at 216.

The Federal Circuit nevertheless concluded that monetary relief in the CFC and monetary relief in district court are "completely different" for purposes of Section 1500. The court found it dispositive that the Tribe styled its requests as for "damages at law, not equitable relief," in the CFC and for "equitable relief and not damages" in district court. App., *infra*, 11a-12a. The technical law-equity distinction the court found "critical to the § 1500 analysis," *id.* at 12a, strays even further afield from Section 1500's text than does the holding in *Casman*. A suit involving equitable monetary relief might not be a suit "for" a CFC claim involving money damages in the technical sense, but if it arises from substantially the same operative facts, it is a suit "in respect to" that claim because it is related to the claim and has "at least * * * some overlap" with it, *Keene*, 508 U.S. at 212. The Federal Circuit's narrow attention on the doctrinal source for relief, relevant in the days of a divided bench, disregards *Keene*'s teaching that Congress eschewed "a narrow concept of identity"

in Section 1500 and so denied plaintiffs a "liberal opportunity to maintain two suits arising from the same factual foundation." *Id.* at 213.

If the law-equity distinction were relevant to *Casman*'s exception, *Keene* would have had to address it. But the Court did not do so. Without inquiring whether the "monetary relief" sought in Keene's CFC and district court cases constituted relief at law or at equity, the Court held that the exception for "distinctly different types of relief" did not apply because both actions sought "monetary relief" from the government. 508 U.S. at 216.

Indeed, the Court likely would have reversed rather than affirmed in *Keene* if the Federal Circuit's distinction were correct. The Court affirmed dismissal of a CFC contract claim (*Keene I*) because, in a separate district court tort action in which Keene was the defendant, Keene had pending a third-party complaint "seeking indemnification or contribution from the Government" for any damages that might be awarded against it. See 508 U.S. at 203-204, 216. Indemnification and contribution are understood to be equitable relief.[4] Thus, if the Federal Circuit were correct, Section 1500 would not have applied in *Keene* because such equitable monetary relief would have been "different relief" than

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[4] See, *e.g.*, *United States* v. *Atlantic Research Corp.*, 551 U.S. 128, 141 (2007) (ruling that "traditional rules of equity" governs statutory contribution claim); Restatement (Second) of Torts § 866A cmt. c (1979) ("Contribution is a remedy that developed in equity" and is governed by "equity rules" in the tort context.); *id.* § 866B cmt. c and f (explaining that "[t]he basis for indemnity" is the equitable concept of unjust enrichment and restitution; discussing relationship to contribution); Joseph Story, 2 *Commentaries on Equity Jurisprudence* § 648 (1918) (surveying the "equitable doctrine of contribution").

legal contract damages. *Keene*, of course, held otherwise.

b. The Federal Circuit's approach led it into a thicket of elusive and technical distinctions, largely based on respondent's characterization of its complaints. That result is in derogation of the principle that "jurisdictional rules should be clear," especially in the sovereign immunity context. See *Lapides* v. *Board of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 621 (2002); *Heckler* v. *Edwards*, 465 U.S. 870, 877 (1984) (explaining that "litigants ought to be able to apply a clear test to determine" which federal court has jurisdiction).

The court first reasoned that the Tribe's actions do not seek overlapping relief because the Tribe's district court complaint seeks so-called "old money" (*i.e.*, "money that is already in the government's possession, but that erroneously does not appear in the [Tribe's] accounts"), whereas its CFC complaint seeks so-called "new money" (*i.e.*, "profits that the [Tribe] would have made but for the United States' mismanagement"). App., *infra*, 13a. As the dissenting judge explained, the majority's distinction is untenable. *Id.* at 22a-25a.

In fact, as the dissenting judge noted, the Tribe's CFC complaint—not just its district court complaint—seeks so-called "old money" (money already in the government's possession) by challenging the government's trust-account record-keeping. See App., *infra*, 23a-25a; pp. 8-9, *supra* (discussing CFC complaint). The majority reiterated its law-equity distinction in arguing that the Tribe's CFC complaint seeks "*damages* alone" and not "equitable relief of any type," App., *infra*, 14a, but it provided no reasoned response—let alone one consistent with liberal notice-pleading rules—to the simple

observation that the Tribe's complaints seek overlapping monetary relief.

Conversely, the Tribe's district court complaint—not just its CFC complaint—seeks so-called "new money" (money not already in the government's possession). It does so by requesting monetary relief under equitable doctrines for any injuries resulting from the government's alleged violation of fiduciary duties to "invest" the Tribe's trust assets properly and "maximiz[e] profits" therefrom. See p. 7, *supra* (quoting complaint). Indeed, the complaint specifically states that its request for a trust-fund accounting extends beyond "funds under the custody and control of the United States" so as to capture such unrealized profits, see *ibid.*, and, in both stating its claims and articulating its prayer for relief, the Tribe requests "equitable restitution" and "any additional equitable relief" that may be appropriate. *Ibid.*; App., *infra*, 92a (prayer for relief).

The Federal Circuit's conclusion that the Tribe does not seek an "accounting" in both courts because it does not include an express request for an accounting in its "prayer for relief" to the CFC, App., *infra*, 15a, further underscores the error in its approach to Section 1500. Even if the Tribe only sought to recover profits lost because of mismanagement (so-called "new money") in the CFC, an accounting would be necessary to determine the principal that should have been invested after the Tribe establishes a pertinent governmental investment-related violation. Without knowing that initial investment, there is no way to determine the proper amount of investment profits. The court of appeals accordingly acknowledged that "what would ensue [in the CFC] would amount to an accounting," *ibid.*, but found that result irrelevant to the application of Section 1500.

The court's technicality-laden analysis finds no support in the text of Section 1500. That provision does not refer to "legal" or "equitable" relief—or indeed to the type of relief sought at all—and therefore provides no basis for the Federal Circuit to hinge Section 1500's application on an assessment of the historical and jurisprudential roots for the relief. Compare *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 253 (1993) (construing the term "appropriate equitable relief" under ERISA, 29 U.S.C. 1132(a)(5)). And the court's approach inevitably creates incentives for counsel to generate novel and intricate distinctions in order to pursue the duplicative litigation that Section 1500 was intended to foreclose, thereby opening the door to inconsistent decisions. Section 1500, properly read, prevents that result where, as here, a plaintiff's district court suit against the United States has some "relation or reference to," or "is concerned with," the plaintiff's claim against the government in the CFC. See p. 16, *supra*.

3. The Federal Circuit's interpretation of Section 1500 disregards established jurisdictional and sovereign immunity principles

The Federal Circuit's rationale for its interpretation of Section 1500 contravenes established principles governing the interpretation of statutes restricting federal jurisdiction and waivers of sovereign immunity in actions for monetary relief against the United States. The court reasoned that its decision does not improperly "undermine the policy and purpose of § 1500" of preventing plaintiffs from pursuing two simultaneous actions against the United States in different courts because "[i]n practice, § 1500 does not actually prevent a plaintiff from filing two actions seeking the same relief

for the same claims." App., *infra*, 15a-16a. The court explained that its precedent in *Tecon Eng'rs, Inc.* v. *United States*, 343 F.2d 943 (Ct. Cl. 1965), created an "anomalous rule" under which a plaintiff may evade Section 1500 by strategically "order[ing]" his actions—that is, by filing his CFC claim prior to filing a related suit in another court. App., *infra*, at 16a-17a. Observing that Section 1500 "would never have even come into play" if the Tribe had "simply filed its complaints in reverse order," the court declared that it found no "purpose that § 1500 serves today," that Section 1500 requires "nothing more than a 'jurisdictional dance,'" and that concerns about undermining Section 1500 therefore are "of no real consequence." *Id.* at 17a. On that basis, the court chose to disregard the statute's terms and dismantle its protections.

a. This Court in *Keene*, as noted above, emphasized that Section 1500's "limits upon federal jurisdiction . . . must be neither disregarded nor evaded" because it is "Congress [that] has the constitutional authority to define the jurisdiction of the lower federal courts." *Keene*, 508 U.S. at 207, 217. Yet the Federal Circuit blithely adopted an unduly narrow interpretation of Section 1500 based in part on the premise that it had previously succeeded in rendering Section 1500 a formality. Nothing could be further from the teachings of this Court than this seemingly purposeful attempt to progressively erode a jurisdictional restriction.

Moreover, the court erred in relying on *Tecon*'s limitation of Section 1500, App., *infra*, 16a, because (as the en banc Federal Circuit previously declared) that order-of-filing rule is incorrect. See *UNR Indus.*, 962 F.2d at

1020, 1023.[5] Section 1500 applies regardless whether a plaintiff files its CFC claim first or second because it precludes CFC "jurisdiction" whenever the plaintiff has "pending" in another court a suit that is related to his claim in the CFC. See 28 U.S.C. 1500. The only two decisions of this Court prior to *Keene* that found the statute applicable confirm that conclusion. Both held that the jurisdictional bar in Section 1500's direct predecessor applied when the CFC action is filed first.[6] To be sure, the relevant text was even clearer before 1948, when plaintiffs were expressly prohibited from "fil[ing] or *prosecut[ing]*" any CFC claim if they had a related suit "pending in any other court." 28 U.S.C. 260 (1946) (emphasis added). But as *Keene* makes clear, Congress's enactment of Section 1500 made no change to the "underlying substantive law" with its "deletion of the 'file or prosecute' language in favor of the current reference to 'jurisdiction.'" 508 U.S. at 209; cf. *id.* at 212 (observing that Congress presumably was aware of similar decisions and adopted them in its 1948 codification). Thus, while *Keene* reserved the question whether *Tecon*

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[5] Although *Tecon*'s rule does not directly apply to this case because the Tribe filed suit in district court (one day) before filing in the CFC, the court of appeals incorporated *Tecon*'s interpretation of Section 1500 into its *ratio decidendi* by concluding that the outcome in this case comports with the narrow and self-defeating purpose *Tecon* had attributed to Section 1500.

[6] See *In re Skinner & Eddy Corp.*, 265 U.S. 86, 92, 95 (1924) (Court of Claims erred in vacating voluntary dismissal of petition because the plaintiff filed a district court action immediately after the dismissal); *Corona Coal*, 263 U.S. at 539-540 (dismissing appeal from Court of Claims decision because related district court action was filed while the appeal was pending).

was properly decided, *id.* at 209 n.4, *Keene*'s rationale compels the conclusion that it was not.[7]

b. The Federal Circuit's departure from the text, history, and purpose of Section 1500 cannot be justified by its view of "sound policy"—that "[t]he nation is served by private litigation" against the sovereign that can "control the excesses to which Government may from time to time be prone." App., *infra*, 17a-18a (quoting *Loveladies*, 27 F.3d at 1555-1556). That rationale not only disregards *Keene*'s admonition about the proper role of the courts in this sphere, see 508 U.S. at 217-218,

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[7] The court in *Tecon* was likely motivated to retain jurisdiction because the plaintiffs before it, after conducting a significant amount of litigation in the Court of Claims, "filed the same claims in a district court and then moved the Court of Claims to dismiss [their] case under Section 1500." *UNR Indus.*, 962 F.2d at 1020. The government and the Court of Claims viewed the plaintiff's effort to force the Court of Claims to release jurisdiction as unacceptable conduct and the court, at the government's urging, "retained jurisdiction so it could dismiss the [plaintiff's] case with prejudice." See *ibid.* Although the government supported that result at the time, it subsequently concluded, based on further experience, that Section 1500 should be enforced by its terms and that similar conduct by plaintiffs "should be addressed by imposing sanctions for abuse of process and vexatious litigation." U.S. Br. at 39 n.19, *Keene*, *supra* (No. 92-166); see *UNR Indus.*, 962 F.2d at 1020.

The bizarre litigation spawned by *Tecon*'s order-of-filing rule confirms this judgment. Plaintiffs have filed several related cases on the same day, see, *e.g.*, Pet. App. 94a-98a, requiring evidentiary hearings to determine what *time* a messenger delivered (and court clerks filed) the relevant complaints. In such cases, *Tecon* makes federal jurisdiction turn on whether a CFC judge finds sufficiently credible the testimony of the plaintiff's messenger (perhaps years after the fact) regarding the specific times that the plaintiff's complaints arrived at each court. See, *e.g.*, *Passamaquoddy Tribe* v. *United States*, 82 Fed. Cl. 256, 274-280 (2008) (finding such testimony neither "persuasive [n]or credible" after evidentiary hearings).

but also contravenes fundamental tenets of federal sovereign immunity.

As the Tribe's own complaint reflects (App., *infra*, 60a), Congress enacted limited waivers of sovereign immunity in the Tucker Act and Indian Tucker Act by conferring jurisdiction on the CFC to hear certain claims against the United States. See *United States* v. *Navajo Nation*, 129 S. Ct. 1547, 1551 (2009); *Mitchell*, 463 U.S. at 212, 215; *Tempel* v. *United States*, 248 U.S. 121, 129 (1918). Congress enacted those waivers to precisely the extent it wished, against the well-understood backdrop of Section 1500's longstanding limits on CFC (and Court of Claims) jurisdiction. Such "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981) (citation omitted); see *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941) ("[T]he terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit."). By invoking policy rationales to insist that Congress provide "a clear expression of [its] intent" to preserve sovereign immunity and limit CFC jurisdiction, App., *infra*, 18a, the Federal Circuit had it precisely backwards: It is the waiver, not the recognition, of federal sovereign immunity that must be "'unequivocally expressed' in the statutory text" and "strictly construed, in terms of its scope." *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) (quoting *Lane* v. *Pena*, 518 U.S. 187, 192 (1996)); see *United States* v. *Williams*, 514 U.S. 527, 531 (1995) (Statutory "ambiguities [must be construed] in favor of immunity."); *Library of Cong.* v. *Shaw*, 478 U.S. 310, 321 (1986) ("[P]olicy, no matter how compelling, is insufficient" in this context.).

B. The Federal Circuit's Decision Threatens Significant Adverse Consequences

By holding that Section 1500 permits a plaintiff to maintain two simultaneous actions based on substantially the same operative facts so long as the two suits seek different relief—and by adopting a test that uses technical pleading concepts to discover differences in relief where none appear to the naked eye—the Federal Circuit has eviscerated Section 1500's limitation on CFC jurisdiction. Since this Court in *Keene* returned Section 1500 to the court of appeals' interpretive domain, the Federal Circuit has reinstated its flawed decisions in *Casman* and *Tecon*, and now has used those decisions to support a holding that would allow two suits, one in the CFC and one in district court, to go forward simultaneously against the government, even when based on the same operative facts and seeking similar relief. The court of appeals' decision is plainly incorrect. And because the Federal Circuit exercises exclusive appellate authority over the CFC, 28 U.S.C. 1292(c)(1), 1295(a)(3), this is not a context in which this Court could await for a circuit conflict to develop.[8]

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[8] Regional courts of appeals previously could have construed Section 1500 in an appeal from a Little Tucker Act action for which district courts have concurrent jurisdiction with the CFC. 28 U.S.C. 1346(a)(2); see *Shapiro* v. *United States*, 168 F. 2d 625, 626 (3d Cir. 1948) (finding district court jurisdiction governed by Section 1500). But the Federal Circuit now has exclusive appellate jurisdiction over district court cases based "in whole or in part" on the Little Tucker Act unless the relevant claim is founded on an internal revenue statute or regulation. 28 U.S.C. 1295(a), (a)(2). The potential for Section 1500 to arise in the context of a case concerning an internal revenue provision and falling within the Little Tucker Act's $10,000 threshold is vanishingly remote, and we have identified no such appellate decision.

The implications of the court of appeals' evisceration of Section 1500 are substantial. In the Indian Tucker Act context alone, we have identified at least 31 other pairs of pending cases that Indian Tribes have brought against the United States in the CFC and district court. See App., *infra*, 94a-99a (listing cases). As is true here, the cases in each pair are based on substantially the same operative facts. While the Tribes are entitled to pursue an action against the government, the Federal Circuit's approval of their double-barreled strategy imposes a substantial litigation burden on the United States and the courts and threatens inconsistent judicial rulings. Section 1500 was intended to prevent just such duplicative litigation. Certiorari is therefore warranted to restore that provision's limitations on CFC jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ELENA KAGAN
Solicitor General

IGNACIA S. MORENO
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

ANTHONY A. YANG
Assistant to the Solicitor General

HILARY C. TOMPKINS
Solicitor
Department of the Interior

AARON P. AVILA
Attorney

JANUARY 2010

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2008-5043

TOHONO O'ODHAM NATION, PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

Mar. 16, 2009

Before NEWMAN, LINN, and MOORE, Circuit Judges.

Opinion for the court filed by Circuit Judge LINN. Dissenting opinion filed by Circuit Judge MOORE.

LINN, Circuit Judge.

This case concerns the application of 28 U.S.C. § 1500, the statute that divests the United States Court of Federal Claims of jurisdiction over "any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States." Applying § 1500, the Court of Federal Claims dismissed an action brought by the Tohono O'odham Nation (the "Nation") alleging that the United States breached certain fiduciary duties as trustee of funds and property owned by the Nation. *Tohono O'odham Nation v. United States*, 79 Fed. Cl. 645, 646 (2007). Because we conclude that the Nation's complaint in the Court of Federal Claims seeks relief that is differ-

ent from the relief sought in its earlier-filed district court action, we reverse.

I. BACKGROUND

The Nation is a federally recognized Indian tribe of approximately 26,000 members, located in Arizona. *Tohono O'odham Nation*, 79 Fed. Cl. at 646. Collectively, the Nation's reservations consist of nearly three million acres of land. *Id.* The United States manages the Nation's land and holds income derived from that land in trust, including income from the sale of natural resources and income from leases and other conveyances to third parties. *Id.* Additionally, the United States holds in trust money awarded to the Nation as a result of legal judgments, including $26 million that the United States paid to the Nation to settle a takings and trespass action in 1976. *Id.*

On December 28, 2006, the Nation brought an action in the United States District Court for the District of Columbia against the Secretary of the Interior, the Special Trustee for American Indians, and the Secretary of the Treasury, alleging that the United States had breached certain fiduciary duties in connection with its management of the Nation's trust assets. *See Tohono O'odham Nation v. Kempthorne*, No. 1:06-CV-02236, Doc. 1, at 1 (D.D.C. Dec. 28, 2006) ("*District Court Complaint*"). Specifically, the Nation presented in two counts "an action to seek redress of breaches of trust by the United States, acting by and through the defendants, in the management and accounting of trust assets, including funds and lands, belonging to the plaintiff . . . and to compel the defendants to provide a full and complete accounting of all trust assets belonging to the Nation and to correct the balances of the Nation's trust

fund accounts to reflect accurate balances." *Id.* at 1-2. The Nation's prayer for relief requested nine remedies:

> 1. For a decree construing the trust obligations of the defendants to the Nation, including, but not limited to, the duty to provide a complete, accurate, and adequate accounting of all trust assets belonging to the Nation and held in trust by the defendants.
>
> 2. For a decree that the United States, acting through the defendants, has been in breach of its trust obligations since the inception of this trust and continues to be in breach of those duties today, specifically including, *inter alia*, its fiduciary duty to provide a complete, accurate, and adequate accounting of all trust assets belonging to the Nation and held in trust by the United States.
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> 3. For a decree that the AA Reports do not constitute the complete, accurate, and adequate accounting that the defendants are obligated to provide to the Nation.
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> 4. For a decree delineating the fiduciary duties owed by the defendants to the Nation with respect to the management and administration of the trust assets belonging to the Nation.
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> 5. For a decree directing the defendants (1) to provide a complete, accurate, and adequate accounting of the Nation's trust assets, including, but not limited to, funds under the custody and control of the United States and (2) to comply with all other fiduciary duties as determined by this Court.

6. For a decree providing for the restatement of the Nation's trust fund account balances in conformity with this accounting, as well as any additional equitable relief that may be appropriate (e.g., disgorgement, equitable restitution, or an injunction directing the trustee to take action against third parties).

7. For a decree requiring the defendants to provide to the Nation all material information regarding the management and administration of the trust assets belonging to the Nation and held in trust for its benefit by the defendants.

8. For an award of the Nation's costs of suit, including, without limitation, attorneys' fees under the Equal Access to Justice Act and other statutes as well as general equitable principles, and the fees and costs of expert assistance.

9. For such other and further relief as the Court, as a Chancellor sitting in equity, may deem just and proper.

Id. at 18-19.

On December 29, 2006—one day after it filed its district court complaint—the Nation brought a second action in the Court of Federal Claims. The complaint characterized that second action as "an action for money damages against the United States, brought to redress gross breaches of trust by the United States . . . as trustees and trustee-delegates of land, mineral resources and other assets held by them for the benefit of the Tohono O'odham Nation." *Tohono O'odham Nation v. United States*, No. 06-CV-944, Doc. 1, at 1 (Ct. Fed.

Cl. Dec. 29, 2006) ("*Court of Federal Claims Complaint*"). In its Court of Federal Claims action, the Nation asserted four counts, entitled "Damages Resulting from the United States' Breach of Fiduciary Duty with Respect to the Management of the Nation's Mineral Estate," "Damages Arising from the United States' Breach of Fiduciary Duty with Respect to the Management of the Nation's Non-Mineral Estate," "Damages Arising from the United States' Breach of Fiduciary Duty with Respect to the Management of Judgment Funds," and "Damages Arising from the United States' Breach of Fiduciary Duty with Respect to Deposit and Investment of Trust Funds." *Id.* at 9-12. In its prayer for relief, the Nation asked:

> 1. For a determination that the Defendant is liable to the Nation in damages for the injuries and losses caused as a result of Defendant's breaches of fiduciary duty;
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> 2. For a determination of the amount of damages due the Nation plus interest as allowed by law;
>
> 3. That the costs of this action, including reasonable attorneys fees, be awarded to the Nation;
>
> 4. For such other and further relief as the Court deems just and appropriate.

Id. at 13.

The United States moved to dismiss the Nation's action in the Court of Federal Claims for lack of jurisdiction in light of 28 U.S.C. § 1500. *Tohono O'odham Nation*, 79 Fed. Cl. at 646. The Court of Federal Claims concluded that the Nation's claim "arises from the same

operative facts and seeks the same relief as the claim in district court." *Id.* at 659. As a result, the Court of Federal Claims held that it lacked jurisdiction under § 1500, and it granted the United States' motion to dismiss. *Id.*

The Nation timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3) (2006). "We review the Court of Federal Claims's dismissal for lack of jurisdiction *de novo*." *Sacco v. United States*, 452 F.3d 1305, 1308 (Fed. Cir. 2006).

II. DISCUSSION

Section 1500 provides:

> The United States Court of Federal Claims shall not have jurisdiction of any *claim* for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

28 U.S.C. § 1500 (emphasis added).

Following a series of cases in which this court interpreted the meaning of "claim" in § 1500, see, e.g., *Johns-Manville Corp. v. United States*, 855 F.2d 1556 (Fed. Cir. 1988); *UNR Indus., Inc. v. United States*, 962 F.2d 1013 (Fed. Cir. 1992) (en banc), the Supreme Court addressed the issue in *Keene Corp. v. United States*, 508 U.S. 200 (1993), *aff'g UNR*, 962 F.2d 1013. The Supreme Court remarked that § 1500 "requires a comparison between the claims raised in the Court of Federal Claims and in the other lawsuit." *Keene*, 508 U.S. at 210. The

Supreme Court also recognized, however, that § 1500 does not define the critical term "claim" and that "[t]he exact nature of the things to be compared is not illuminated . . . by the awkward formulation of § 1500." *Id.*

In *Keene*, the Supreme Court held that "the comparison of the two cases for purposes of possible dismissal would turn on whether the plaintiff's other suit was based on substantially the same operative facts as the Court of Claims action, at least if there was some overlap in the relief requested." *Id.* at 212. The Supreme Court expressly left open "whether two actions based on the same operative facts, but seeking completely different relief, would implicate § 1500." *Id.* at 213 n.6.

The dissent treats the Supreme Court's analysis in *Keene* as the final word on the matter. *See* Dissenting Op. at 1, 3-7. However, shortly after *Keene*, this court, sitting en banc, interpreted and applied the *Keene* opinion and expressly addressed the question that *Keene* left open. In *Loveladies Harbor, Inc. v. United States*, after reviewing this court's earlier tests for the same claim in § 1500 cases in light of the Supreme Court's holding in *Keene*, we held:

> Taken together, these tests produce a working definition of "claims" for the purpose of applying § 1500. For the Court of Federal Claims to be precluded from hearing a claim under § 1500, the claim pending in another court must arise from ***the same operative facts***, and must seek ***the same relief***.

27 F.3d 1545, 1551 (Fed. Cir. 1994) (en banc).

It is the *Loveladies* court's interpretation of *Keene* that is binding on this panel. *See, e.g., Barclay v. United States*, 443 F.3d 1368, 1373 (Fed. Cir. 2006) ("Panels of

this court are bound by previous precedential decisions until overturned by the Supreme Court or by this court *en banc*"); *Foster v. Hallco Mfg. Co.*, 947 F.2d 469, 475 n.5 (Fed. Cir. 1991) (remarking that district court committed legal error by reinterpreting an earlier Supreme Court case, rather than applying this court's subsequent interpretation of that case), *see also Walton v. Bisco Indus., Inc.*, 119 F.3d 368, 371 n.4 (5th Cir. 1997) ("To the extent that [the appellant] believes that we have construed [an earlier Supreme Court decision] incorrectly, we note that absent an intervening Supreme Court decision or a decision by this court sitting en banc, we are bound by a prior panel's interpretation."); *Tucker v. Phyfer*, 819 F.2d 1030, 1035 n.7 (11th Cir. 1987) ("[H]ad the [earlier] panel expressly considered [two Supreme Court decisions], we would be bound by its interpretation and application of those decisions."); *Diamond Shamrock Co. v. N.L.R.B.*, 443 F.2d 52, 60 n.27 (3d Cir. 1971) (holding that court is bound by prior panel's interpretation of Supreme Court decision); *cf. United States v. Rapanos*, 376 F.3d 629, 642 (6th Cir. 2004), *vacated on other grounds*, 547 U.S. 715 (2006) (rejecting appellee's argument concerning interpretation of a Supreme Court decision because it had "previously been adjudicated by this court, in a published disposition, and its conclusion is entitled to *stare decisis*"). The dissent errs by interpreting and applying *Keene* de novo and ignoring the interpretation of *Keene* set forth in *Loveladies*.

Under the test set forth in *Loveladies*, § 1500 is applicable only if two claims "arise from the same operative facts" and "seek the same relief." *Loveladies*, 27 F.3d at 1551. Conversely, if an action in the Court of Federal Claims *either* arises from different operative

facts *or* seeks completely different relief than the earlier-filed action, then § 1500 does not divest the Court of Federal Claims of jurisdiction. In this case, the "same relief" prong is dispositive.[1]

Drawing on the "distinctly different" language in *Loveladies*, the United States argues for a sweeping rule that "it is the *form* of the relief that matters—here, money." Br. of Def.-Appellee United States at 43; *see also id.* at 43 n.10 (arguing for "[a] rule that it is the form of relief sought in the two courts that matters for purposes of Section 1500"). In the United States' view, the "same relief" prong is always satisfied whenever two complaints both seek *any* relief in the form of money—irrespective of any differences in the amounts requested, the basis for the calculation of those amounts, the alleged injuries giving rise to those amounts, or the court's authority for awarding the requested money (i.e., as damages, as an equitable remedy, or under some other authority).

We disagree that the "distinctly different" language in *Loveladies* compels such a sweeping rule. To the contrary, *Loveladies* refers interchangeably to "distinctly different" relief and simply "different" relief. *See, e.g.*, *Loveladies*, 27 F.3d at 1549 ("distinctly different relief"); *id.* at 1550 ("different form of relief"); *id.* at 1551 ("relief distinctly different"); *id.* at 1552 ("distinctly different relief"); *id.* at 1552-53 ("different relief"); *id.* at 1553 ("relief different"). We see no meaningful difference —distinct or otherwise—between "different" and "distinctly different." Either the relief requested in two

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[1] Because we conclude that the "same relief" prong of the *Loveladies* test is not met, we do not address whether the Nation's complaints arise from the same operative facts.

complaints is the same, or it is different. An award of back wages for a particular time period under the Equal Pay Act is the same as—not "different" or "distinctly different" from—an award of back wages for that same time period under Title VII. *See Harbuck v. United States*, 378 F.3d 1324, 1329 (Fed. Cir. 2004). By contrast, injunctive relief is "different"—or "distinctly different"—from money damages. *See, e.g., Johns-Manville*, 855 F.2d at 1566. There is no requirement of any heightened showing of "difference." Rather, we must determine simply whether the relief that the Nation requested in its Court of Federal Claims complaint is the same as the relief that it requested in its district court complaint.

To answer that question, we look to each complaint's prayer for relief. *See Loveladies*, 27 F.3d at 1553 (focusing on prayers for relief). In its district court complaint, the Nation requested relief that falls into seven categories:

(i) a declaration that the United States has certain specific trust obligations (requests 1 and 4);

(ii) a declaration that the United States is in breach of those obligations (requests 2 and 3);

(iii) an accounting (requests 5(1) and 7);

(iv) an order directing the United States to comply with its other trust obligations going forward (request 5(2));

(v) restatement of trust account balances in conformity with the accounting "as well as any

additional equitable relief that may be appropriate (e.g., disgorgement, equitable restitution, or an injunction directing the trustee to take action against third parties)" (request 6);

(vi) costs and attorneys' fees (request 8); and

(vii) "other and further relief as the Court, as a Chancellor sitting in equity, may deem just and proper" (request 9).

District Court Complaint, at 18-19. In essence, the Nation requested that the district court declare that the United States was in breach of its duties as a trustee and order specific performance of those duties. Notably, all of the requested relief is equitable relief, not damages. *See Johns-Manville*, 855 F.2d at 1566 (distinguishing "money" damages and "equitable" relief as "different type[s] of relief" for purposes of § 1500); *Loveladies*, 27 F.3d at 1550 (same). The Nation, in fact, was careful to limit its request for "other and further relief" in the district court to relief "as the Court, as a Chancellor sitting in equity, may deem just and proper." *District Court Complaint*, at 19.

By contrast, the Nation's complaint in the Court of Federal Claims seeks damages at law, not equitable relief. In its prayer for relief in the Court of Federal Claims, the Nation requested only damages (requests 1 and 2), attorneys' fees and costs (request 3), and "such other and further relief as the Court deems just and appropriate" (request 4). *Court of Federal Claims Complaint*, at 13. Moreover, the word "Damages" appears in the title of all four of the Nation's counts. *Id.* at 9-12. Nowhere in its prayer for relief in the Court of Federal

Claims does the Nation seek specific performance, an injunction, or any other type of equitable relief.

The Nation's careful separation of equitable relief and money damages is critical to the § 1500 analysis in this case, just as it was in *Loveladies*. In concluding that the two complaints at issue requested different relief, the court in *Loveladies* reasoned that "[i]t is important to note that the prayer in the Court of Claims complaint contained an express request for damages. Significantly, that request was missing from the complaint in the district court." *Loveladies*, 27 F.3d at 1553. Likewise, in this case, the Nation's complaint in the district court requests only equitable relief and not damages, while the Nation's complaint in the Court of Federal Claims requests only damages and not equitable relief.

The Court of Federal Claims identified two areas of "what looks like overlapping relief (money and an accounting in both courts)." *Tohono O'odham Nation*, 79 Fed. Cl. at 656. As for "money," the court reasoned that the Nation's "district court complaint specifically seeks money (disgorgement, restatement of accounts, and restitution)," and that this request overlaps with its request for money damages in the Court of Federal Claims. *Id.* at 652. As far as an accounting, the court concluded that an accounting in aid of judgment in the Court of Federal Claims would overlap with the request for an accounting in the district court.

We disagree. The Nation's district court complaint requests an accounting and a "restatement of the Nation's trust fund account balances in conformity with this accounting, as well as any additional equitable relief that may be appropriate" including disgorgement or equitable restitution. *District Court Complaint*, at 18. In

other words, the Nation is requesting that, following the accounting, its account balances be adjusted to reflect the correct amounts to correct any errors discovered in the accounting. The Nation refers to this as a request for "old money"—namely, money that is already in the government's possession, but that erroneously does not appear in the Nation's accounts. In the course of making an adjustment of account balances, it may be necessary for the court to order other "equitable relief that may be appropriate," including disgorgement or equitable restitution, if it is discovered that the United States has misappropriated funds from the Nation's trust and/or improperly profited from the Nation's "old money."

This equitable relief as "appropriate" in connection with the accounting is not the same as the "damages for the injuries and losses" that the Nation has requested in the Court of Federal Claims. *Court of Federal Claims Complaint*, at 13. Notably, each of the "injuries" that the Nation alleges in the Court of Federal Claims is an injury resulting from the United States' failure to properly manage the Nation's assets to obtain the maximum value. *See id.* at 9 (count 1 alleging mismanagement of mineral estate); *id.* at 10 (count 2 alleging mismanagement of non-mineral estate); *id.* at 11 (count 3 alleging mismanagement of judgment funds); *id.* at 12 (count 4 alleging mismanagement in deposit and investment of funds). The "injuries and losses" for which the Nation seeks relief are essentially consequential damages —profits that the Nation would have made but for the United States' mismanagement. The Nation refers to these profits as "new money." Thus, the Court of Federal Claims complaint seeks damages in the form of "new money" that the Nation should have earned as

profit but did not, while the district court complaint seeks return of "old money" that belongs to the Nation but erroneously does not appear on its balance sheet. These are not the same types of relief.

The dissent acknowledges that it would be possible to craft two complaints to avoid § 1500 by requesting "old money" in one, and "new money" in the other. Dissenting Op. at 5. However, the dissent concludes that the Nation's complaint in the Court of Federal Claims is not limited to "new money." *Id.* [*sic*] Specifically, the dissent reasons that the Court of Federal Claims complaint "alleges fiduciary breaches related to ['old money'" and then "broadly asks for money for breaches of the fiduciary duty." *Id.* at 5-6. But the Nation's Court of Federal Claims complaint does not "broadly ask[ ] for money" as the dissent suggests. To the contrary, the Court of Federal Claims complaint expressly asks for *damages* alone—not any other form of monetary relief, and not equitable relief of any type. *See, e.g.*, *Court of Federal Claims Complaint* at 1 (entitled "COMPLAINT FOR DAMAGES FOR BREACH OF TRUST OBLIGATIONS"); *id.* ("This is an action *for money damages* . . . ." (emphasis added)); *id.* ("[The] Nation seeks *damages for Defendant's mismanagement* of the Nation's trust property." (emphasis added)). Nowhere in the Court of Federal Claims complaint does the Nation make any broad request for "money for breaches of fiduciary duty." Moreover, the very language that the dissent quotes from the Nation's prayer for relief makes clear that the Nation is requesting only consequential damages—i.e., "new money"—not restitution, disgorgement, or other equitable "old money" relief in the Court of Federal Claims: "For a determination that the Defendant is liable to the Nation *in damages* for the inju-

ries and losses caused *as a result* of Defendant's breaches of fiduciary duty." *Court of Federal Claims Complaint* at 13 (emphases added). We therefore disagree with the dissent that the Nation made any request for "old money" in the Court of Federal Claims.

As to the second area of "what looks like overlapping relief" identified by the Court of Federal Claims, the Nation did not —as the Court of Federal Claims suggests— "ask[ ] for . . . an accounting in both courts." *Tohono O'odham Nation*, 79 Fed. Cl. at 656. As the Court of Federal Claims pointed out, it is the relief that the plaintiff *requests* that is relevant under § 1500. *Id.* at 654 (citing *Keene*, 508 U.S. at 212; *Frantz Equip. Co. v. United States*, 98 F. Supp. 579, 580 (Ct. Cl. 1951)). The Nation's prayer for relief in the Court of Federal Claims does not request an accounting. The fact that, "assuming this action were to proceed in [the Court of Federal Claims], and plaintiff satisfied its burdens of proof, what would ensue would amount to an accounting, albeit in aid of judgment," *id.* at 653, does not transform the Nation's unambiguous request for damages into a request for an accounting.

Finally, we address the United States' argument that permitting the Nation's claims to go forward in the Court of Federal Claims would undermine the policy and purpose of § 1500. The United States argues that "the policy and purpose underlying Section 1500 is that the United States not be required to defend the same claims at the same time in two different courts; that is exactly what the Nation seeks to do here." Br. of Defendant-Appellee United States at 11-12; *see also Tohono O'odham*, 79 Fed. Cl. at 654 (noting that the "purpose of section 1500 was to force plaintiffs to elect between the

Court of Claims and another court in which to pursue its whole claim against the government" (citing *Casman v. United States*, 135 Ct. Cl. 647, 654 (1956))). The dissent similarly argues that § 1500 allows the government to avoid duplicative litigation. Dissenting Op. at 1 n.1.

In practice, § 1500 does not actually prevent a plaintiff from filing two actions seeking the same relief for the same claims. It merely requires that the plaintiff file its action in the Court of Federal Claims *before* it files its district court complaint. This anomalous rule is the result of a series of decisions by this court, our predecessor court, and the Supreme Court. In *Tecon Engineers, Inc. v. United States*, our predecessor court held that "the only reasonable interpretation of [§ 1500] is that it serves to deprive [the Court of Federal Claims] of jurisdiction of any claim for or in respect to which plaintiff has pending in any other court any suit against the United States, only when the suit shall have been commenced in the other court before the claim was filed in [the Court of Federal Claims]." 343 F.2d 943, 949 (Ct. Cl. 1965). Later, this court, sitting en banc, overruled *Tecon*. *UNR*, 962 F.2d at 1022-23. The Supreme Court granted certiorari in *UNR* (then re-named *Keene*), and held that it was "unnecessary to consider, much less repudiate, the 'judicially created exceptions' to § 1500 found in *Tecon Engineers*" and other cases. *Keene*, 508 U.S. at 216. We have since recognized that *Tecon* is still good law, because the aspect of *UNR* that had overruled it was undone by the Supreme Court. *See, e.g., Hardwick Bros. Co. II v. United States*, 72 F.3d 883, 886 (1995) ("[T]he Supreme Court expressly declined to overturn *Tecon Engineers*, and this court in *Loveladies I* acknowledged the continuing vitality of Tecon as an established precedent."); *id.* ("After *UNR/Keene* and

Loveladies I, *Tecon Engineers* remains good law and binding on this court."). Therefore, in this case, had the Nation simply filed its complaints in reverse order, § 1500 would never have even come into play.

The Supreme Court has discussed at length the post-Civil War origins of § 1500. *See, e.g.*, *Keene*, 508 U.S. at 206 (remarking that the lineage of § 1500 "runs back more than a century" and that its original purpose was to preclude duplicative actions seeking compensation for seized cotton by parties who had given aid to Confederate soldiers). However, neither the Supreme Court nor this court has found any purpose that § 1500 serves today. Because a party can simply file its Court of Federal Claims action first and avoid § 1500 entirely, it functions as nothing more than a "jurisdictional dance." *Loveladies*, 27 F.3d at 1549. Thus, the government's and the dissent's argument about the policy and purpose of the statute rings hollow and, moreover, is of no real consequence in this appeal. As we explained in *Loveladies*:

> Litigation can serve public interests as well as the particular interests of the parties. The nation is served by private litigation which accomplishes public ends, for example, by checking the power of the Government through suits brought under the APA or under the takings clause of the Fifth Amendment. Because this nation relies in significant degree on litigation to control the excesses to which Government may from time to time be prone, it would not be sound policy to force plaintiffs to forego monetary claims in order to challenge the validity of Government action, or to preclude challenges to the validity of Government action in order to protect a Constitu-

> tional claim for compensation. Section 1500 was enacted to preclude duplicate cotton claims—claims for money damages—at a time when *res judicata* principles did not provide the Government with protection against such "duplicative lawsuits." Whatever viability remains in § 1500, absent a clear expression of Congressional intent we ought not extend the statute to allow the Government to foreclose non-duplicative suits, and to deny remedies the Constitution and statutes otherwise provide.

Id. at 1555-56 (citations omitted).

Although our decision in this case will require the government to litigate in multiple fora, we note that there is no risk of double recovery. The Nation's complaint in the Court of Federal Claims seeks only "new money" damages—relief that the Nation has not requested in district court, and which the district court is, in any event, powerless to award. *See* 5 U.S.C. § 702 (excluding district court actions seeking "money damages" from waiver of sovereign immunity). Conversely, the Nation's complaint in district court seeks only separate equitable relief, which the Court of Federal Claims is powerless to award. *See, e.g., Nat'l Air Traffic Controllers Ass'n v. United States,* 160 F.3d 714, 716 (Fed. Cir. 1998) ("Although the Tucker Act has been amended to permit the Court of Federal Claims to grant equitable relief ancillary to claims for monetary relief over which it has jurisdiction, there is no provision giving the Court of Federal Claims jurisdiction to grant equitable relief when it is unrelated to a claim for monetary relief pending before the court." (citations omitted)). Our decision therefore will not permit the Nation to obtain double recovery.

Because the relief requested in the Nation's district court complaint is different from the relief requested in its Court of Federal Claims complaint, § 1500 does not divest the Court of Federal Claims of jurisdiction. The Court of Federal Claims therefore erred by dismissing the Nation's action for lack of subject matter jurisdiction.

III. CONCLUSION

For the foregoing reasons, the Court of Federal Claims's order dismissing the Nation's complaint is *reversed*. We *remand* for proceedings consistent with this opinion.

REVERSED AND REMANDED.

MOORE, Circuit Judge, dissenting.

In *Keene v. United States*, the Supreme Court held that § 1500 deprives the Court of Federal Claims of jurisdiction when "plaintiff's other suit was based on *substantially the same operative facts* . . . at least if there was *some overlap in the relief requested*. . . . Congress did not intend the statute to be rendered useless by a narrow concept of identity." 508 U.S. 200, 212-13 (1993) (emphasis added).[1] Because I conclude that the Tohono

[1] Because monetary suits in excess of $10,000 must be filed in the Court of Federal Claims, *Gonzales & Gonzales Bonds & Insurance Agency, Inc. v. Department of Homeland Security*, 490 F.3d 940, 943 (Fed. Cir. 2007), but absent special exceptions not applicable here, equitable relief must be obtained from the federal district courts, *id.*, many plaintiffs are required to file two separate suits to obtain all the relief to which they are entitled. Plaintiffs must file their separate complaints with precision to avoid seeking overlapping relief and thereby implicating § 1500. Under principles of sovereign immunity,

O'Odham Nation's (Nation) suits were based on substantially the same operative facts and that the two complaints included some overlap in the relief requested, I respectfully dissent.

I.

The two complaints were based on substantially the same operative facts. The Nation acknowledges that "[i]n each case it is the trust relationship between the United States as trustee and the Nation as beneficiary that underlies the Nation's claims" and that "the Nation's claims involve the same plaintiff, the same defendant, and perhaps even some of the same property." Further, as the Court of Federal Claims illustrated in great detail, the complaints' recitations of the facts are nearly identical. The Nation argues that because the district court action is based on the duty of accounting and the Court of Federal Claims action is based on the duty of good management, the facts necessary to win its case on each cause of action are different.

The legal theories underlying the claims at issue are irrelevant in a § 1500 analysis. *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1564 (Fed. Cir. 1988) ("Since the legal theory is not relevant, neither are the elements of proof necessary to present a prima facie case under that theory."). Although we have not set forth a full and complete definition for the term "opera-

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the government can dictate the permissible circumstances of suits against it. Section 1500 prevents multiple simultaneous litigations against the government. The fact that the statute's scope was reduced by *Tecon Engineers, Inc. v. United States*, 343 F.2d 943, 949 (Ct. Cl. 1965), does not mean that it no longer serves a purpose. Moreover, it is not necessary for a court to justify a particular statute's purpose in order to give effect to that statute.

tive facts,"[4] it is clear that the operative facts are not the "elements of proof necessary" to prove the theory. *See Harbuck v. United States*, 378 F.3d 1324 (Fed. Cir. 2004). In *Harbuck*, the district court complaint alleged sex discrimination in the plaintiff's employment with the Air Force and the Court of Federal Claims complaint alleged a violation of the Equal Pay Act. We held that the operative facts were the same in both complaints and characterized them as follows: "the Air Force's alleged sexual discrimination by payment of lesser compensation to women than to men for the same or substantially equal work." *Id.* at 1328. To be sure, different facts are needed to prove a claim under Title VII (failing to promote) and a claim under the Equal Pay Act (paying less). Nevertheless, we held that "[t]he difference between the two theories upon which she relies are but different manifestations of the same underlying claim that the Air Force discriminated against women by paying them less than men." *Id.* at 1329. Similarly, although the Nation puts forth two different legal theories, the operative facts underlying these theories are "substantially the same." *Keene*, 508 U.S. at 212. The majority does not hold otherwise.

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[4] As we commented in *Loveladies Harbor, Inc. v. United States* 27 F.3d 1545, 1551, n. 17 (Fed. Cir.1994) (en banc):

> Despite its lineage, it can be argued that there is a basic epistemological difficulty with the notion of legally operative facts independent of a legal theory. Insofar as a fact is "operative"—i.e., relevant to a judicially imposed remedy—it is necessarily associated with an underlying legal theory, that is, the cause of action. For example, without legal underpinning, words in a contract are no different from casual correspondence. Because it is unnecessary for our decision in this case, we need not further refine the meaning of "operative facts."

II.

The two complaints included "some overlap in the relief requested."[3] *Keene*, 508 U.S. at 212. In both courts, the Nation is asking for monetary compensation for the government's alleged failures to fulfill its duties.[4] The Nation admits this, but argues that it is seeking different money in each court: "old money" from the district court and "new money" from the Court of Federal Claims. The "old money," the Nation argues, would effect a "restatement of the Nation's trust fund account balances in conformity with [the] accounting." Appellant Br. at 50. The "old money" is therefore the result of a breach in fiduciary duty related to the actual trans-

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[3] I do not understand the majority's assertion that *Loveladies* is an "interpretation" of the standard set forth in *Keene*. *Keene* held that § 1500 deprives the Court of Federal Claims of jurisdiction when "plaintiff's other suit was based on substantially the same operative facts . . . at least if there was some overlap in the relief requested." 508 U.S. at 212. *Loveladies* held that "the claims in the two courts are for distinctly different and not the same or even overlapping relief-this case presents the straightforward issue of plaintiffs who seek distinctly different types of relief in the two courts." 27 F.3d at 1554. Ultimately, the majority and I both analyze the complaints to see if there is some overlap in the relief requested, and it is on this point that we disagree.

[4] The government also argues that the Nation's request for damages in the Court of Federal Claims would require an accounting in aid of judgment. According to the government, this accounting would overlap with the general accounting that the Nation requested in the district court. Because I believe that the Nation has requested overlapping monetary relief in the two complaints, I do not express an opinion on whether it requested overlapping equitable relief. Because the majority held that there is no overlapping relief at all between the two complaints, it must have concluded that for the purposes of § 1500, an accounting in aid of judgment for monetary damages arising from a duty to manage funds does not overlap with a general equitable accounting arising from a duty to provide an adequate accounting.

actions that took place—errors that would be revealed by an accounting. The "new money," in contrast, is "to compensate it for the pecuniary losses it suffered as a result of the government's imprudent management and investment actions." Appellant Reply Br. at 21; Appellant Br. at 51-52 (explaining that the Nation seeks "pecuniary losses suffered as a result of the government's failure prudently to manage and invest trust assets").

It seems plausible that carefully drafted complaints could distinguish particular pots of money as different relief, but these complaints nowhere discuss this concept. For purposes of § 1500, we look at the relief *requested* in the complaint. *Keene*, 508 U.S. at 212; *Dico v. United States*, 48 F.3d 1199, 1203 (Fed. Cir. 1995). In *Dico*, the plaintiff attempted to overcome the plain language of its two complaints and distinguish a takings claim and a due process claim by arguing that they related to different property interests. We disagreed, holding that it was "too late for Dico to attempt at this stage to recast . . . the relief sought by" the two counts. *Id.* Rather, "the plain language" of the complaint controls the outcome. *Id.* Here, the plain language of the complaints repudiates the Nation's argument.

The complaint in the Court of Federal Claims is not limited to "new money" as the Nation argues now. The complaint clearly alleges fiduciary breaches related to "old money:"

- Count 1 states: "The United States, as trustee, has never provided the Nation a complete and accurate accounting of the revenue the United States collected or was required to collect under mineral leases and permits. Nor has it provided

the Nation complete records of such leases and permits it is required to maintain as trustee."

- Count 2 states: "The United States, as trustee, has never provided the Nation a complete and accurate accounting of the revenue the United States collected or was required to collect, in granting easements and rights of way and leasing tribal properties. Nor has it provided the Nation complete records of such transactions which it is required to maintain as trustee."
- Count 3 states: "At no time has the United States provided the Nation a complete and accurate accounting of judgment funds held in trust for its benefit."

In the prayer for relief in the Court of Federal Claims complaint, the Nation asks for monetary damages in this way: "For a determination that the Defendant is liable to the Nation in damages for injuries and losses caused as a result of Defendant's breaches of fiduciary duty." *Court of Federal Claims Complaint*, Prayer for Relief ¶ 1. Given that the counts clearly allege breaches of fiduciary duty related to the "old money" and the prayer for relief broadly asks for money for breaches of the fiduciary duty, the Nation has clearly asked for "old money" and therefore overlapping relief.

Contrary to the view of the majority, the Nation's requests for restitution and disgorgement (money) in the district court overlap with its request for "damages for injuries and losses caused as a result of Defendant's breaches of fiduciary duty" (money) in the Court of Federal Claims. While it may be true that money damages is a different technical legal theory than equitable restitution or disgorgement, nonetheless the claim for money damages can access the same pot of "old money" that

the equitable claims in the district court can access. The Nation can ask for restitution for the errors revealed in an accounting and damages for errors revealed in an accounting. While these remedies have different legal names, they are both the same "old money." Simply by invoking the word "damages," the Nation cannot disclaim its allegations that the government violated its accounting duties. *See Dico*, 48 F.3d at 1203 ("That the legal theories are different does not mean that the relief is different."); *Johns-Manville*, 855 F.2d at 1566 ("In the present case, however, the relief sought from both courts is money, but under different theories."). Rather, it is clear that the Nation requests money damages to make it whole for harms that it suffered, and a loss of "old money" for breach of accounting duties is one of the harms it repeatedly alleges in the Court of Federal Claims complaint. I am bound by § 1500 and where, as here, overlapping relief is sought, the action in the Court of Federal Claims must be dismissed.[5]

The Nation further reasons that because of the jurisdictional limitations of the two courts, we must construe

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[5] The Nation argues that the district court complaint seeks only "old money" for breach of accounting duties. While the district court complaint does ask for an equitable accounting and alleges breaches of fiduciary duties related to the "old money," it also alleges breaches which are related only to "new money." *See, e.g., District Court Complaint* at ¶ 20(f) ("failure to use reasonable skill and care to invest and deposit trust funds in such a way as to maximize the productivity of trust property"). The government, however, does not have to establish complete overlap in the relief sought in the two actions. Since the complaint in the Court of Federal Claims asks for money for failure to properly keep account of the revenue and collections ("old money") and failure to properly manage and invest ("new money"), there is overlap. We need not reach the issue therefore of whether the district court complaint likewise seeks both.

the complaints so that they do not ask for relief that is jurisdictionally precluded. The Nation asks us to cure its pleading defect by construing the complaints consistent with the court's jurisdiction which would then avoid overlapping relief. We should decline to do so.[6] Rather, we must again focus on the relief requested, and here, the complaints give no indication whatsoever that the claims are jurisdictionally bounded.

It is the Nation's responsibility, not ours, to draft two complaints requesting relief with no overlap. *See Dico*, 48 F.3d at 1204 ("[I]t is the responsibility of the plaintiff to allege, clearly and with specificity, that different claims are involved in its two actions."). If we are obligated in every case to parse the complaints based not on what the parties requested, but rather what jurisdiction entitled them to, then § 1500 would never apply. Had the Nation articulated its requests in its complaints with the subtlety that it has done on appeal, this might have been a different case. As it stands, I am compelled to conclude that the Nation's suits were based on substantially the same operative facts and that the two complaints included some overlap in the relief requested. Therefore, I respectfully dissent.

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[6] As an initial matter, the jurisdiction of the district court is irrelevant:

> The applicability of Sec. 1500 to the first claim of plaintiff, asserted in its petition herein, is not conditioned upon the question of whether the District Court had jurisdiction of the claim asserted by the plaintiff therein; and it is not necessary to the decision, upon the defendant's plea to the jurisdiction of this court, for us to discuss the question of whether or not the District Court does or does not have jurisdiction of the counterclaim filed by plaintiff therein.

Frantz Equip. Co. v. United States, 98 F. Supp. 579, 580 (Ct. Cl. 1951).

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

No. 06-944L

THE TOHONO O'ODHAM NATION, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Dec. 19, 2007

OPINION

BRUGGINK, Judge.

This is one of numerous actions pending in this court and the federal district courts brought by Indian tribes against the United States for breach of trust. Plaintiff, the Tohono O'odham Nation ("Nation or "plaintiff"), a federally recognized Indian tribe, alleges that the United States, acting by and through the Secretary of the Interior, the Special Trustee for American Indians, and the Secretary of the Treasury, breached its fiduciary duties as trustee of various funds and property owned by the Nation. Accordingly, plaintiff, as beneficiary, seeks damages for losses resulting from defendant's alleged mismanagement of the trust funds and property. The day before filing this action, plaintiff filed a suit in district court against the United States similarly seeking to redress breaches of trust with respect

to the accounting and management of the same trust assets. Pending now is defendant's motion to dismiss pursuant to Rule 12(b)(1) of the Rules of the United States Court of Federal Claims ("RCFC") for lack of jurisdiction because of the operation of 28 U.S.C. § 1500 (2000) ("section 1500"), a statutory provision that divests this court of jurisdiction to hear claims that are already pending in another court. The matter is fully briefed. Oral argument was heard on October 3, 2007. For the reasons discussed below, we grant defendant's motion to dismiss.

BACKGROUND[1]

The United States has long maintained a unique relationship with various Native American tribes, acting as trustee of tribal lands and funds for the benefit of the individual tribes. Such is the case with the lands and funds of the Tohono O'odham Nation, a tribe of approximately 26,000 members located in southern Arizona. Between 1874 and 1955, a series of executive orders and Acts of Congress established various areas of non-contiguous land as the Nation's tribal reservations. Collectively, the land is the second largest Indian reservation in the United States, consisting of nearly three million acres. The United States manages both the Nation's tribal land and any income derived therefrom. Sources of income include the sale of valuable natural resources, such as copper, sand and gravel, and the conveyance of partial interests in tribal land to third parties, such as leases, easements, and rights-of-way. In addition, the United States holds in trust money awarded from legal

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[1] The facts are drawn from the two complaints, and, for purposes of this motion, are assumed to be correct.

judgments ("judgment fund") against the federal government on various claims brought by the Nation before the Indian Claims Commission. The judgment fund includes an award of $26 million to the Nation in 1976 as settlement for a takings and trespass claim against the United States.

On December 28, 2006, the Nation filed suit in the United States District Court for the District of Columbia, setting forth a variety of allegations of breach of fiduciary duties with respect to the United States' management and administration of the Nation's trust assets. The Nation's principal complaint is that the United States, as trustee, has "grossly mismanaged and continue[s] to grossly mismanage the trust and [has] failed for over a century to carry out the most basic and fundamental trust duties owed to the Nation." District Compl. ¶ 4. The district court complaint describes various examples of mismanagement, including the United States' failure to provide an adequate accounting of trust assets; failure to maintain an adequate accounting system and adequate trust records; failure to ensure that the trust assets are managed so as to yield a maximum return to the Nation; failure to collect, invest, and disburse trust funds; and improper conversion of trust funds for use by the United States.

As a result of the alleged mismanagement of the trust assets, the Nation argues that it is unable to determine the "true state of its trust assets." *Id.* ¶ 21. Specifically, the Nation is unable to determine the accurate account balances of trust funds, how much money should have been credited to the funds or paid directly to the Nation, how much of the trust property has been converted to the use of the United States, and whether the

United States obtained fair market value for the various leases and sales of trust assets. The Nation believes such instances of mismanagement constitute breaches of the United States' fiduciary duties as trustee of the Nation's assets.

The Nation characterizes its district court complaint as "an action to compel federal officials to perform a duty owed to the Nation." *Id.* ¶ 9. The Nation asks the district court for a decree delineating the fiduciary duties owed to the Nation; a decree that the United States has breached those duties; a decree directing the United States to provide a complete, accurate, and adequate accounting of all of the trust assets and to comply with its fiduciary duties; a decree "providing for the restatement of the nation's trust fund account balances in conformity with this accounting;" and "any additional equitable relief that may be appropriate (e.g. disgorgement, equitable restitution, or an injunction . . .)."[4] *Id.* Prayer for Relief ¶ 6.

On December 29, 2006, the Nation filed suit in this court. In the complaint, the Nation similarly maintains that, for over a century, the United States has owed, and continues to owe, fiduciary duties and responsibilities to the Nation as trust beneficiary. These duties include, *inter alia*, the proper management and administration of the trust; maintaining accurate accounts and adequate records; performing a complete, accurate, and adequate

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[4] The Nation also requests a declaration with respect to an accounting report prepared by Arthur Andersen LLP, an accounting firm contracted by the United States in the 1990s to reconcile the Nation's trust accounts. The Nation requests that the district court declare that the Andersen report is not a "complete, accurate, and adequate accounting" of the trust accounts. District Compl. Prayer for Relief ¶ 3.

accounting of all trust property for the Nation; maximizing the productivity of the trust assets through reasonably skillful investments; and generally exercising the highest responsibility, care, and skill in the administration of the trust.

The Nation alleges that the United States has "consistently and egregiously failed to comply with these and other fiduciary duties incumbent on a trustee and imposed on the United States." CFC Compl. ¶ 23. The alleged instances of breach include the United States' failure to administer the trust in the interest and for the benefit of the Nation, failure to keep and maintain accurate accounts with respect to the trust assets, failure to preserve the trust assets from loss, failure to collect and deposit trust funds, failure to invest trust assets so as to maximize returns, and failure to refrain from self-dealing with trust assets.

The Nation explains that its action in this court is "for money damages . . . brought to redress gross breaches of trust by the United States . . . as trustee[] of land, mineral resources and other assets." *Id.* ¶ 1. Alleged damages include losses resulting from the United States' failure to obtain fair market value or otherwise compensate the Nation with respect to the removal of natural resources from tribal lands by third parties or the use of tribal lands by third parties in the form of easements, permits, or rights-of-way. The Nation also alleges that it suffered losses from the United States' mismanagement of tribal funds, including the loss of potential investment returns. Accordingly, the Nation requests that the court determine that the United States is liable for the injuries and losses caused

by the breaches of fiduciary duty and for a determination of the amount of damages due.

The complaints closely resemble one another. The following table is a side by side comparison of portions of the allegations presented in each complaint.

District Court	Court of Federal Claims
Nature of Action	*Nature of Action*
"to seek redress of breaches of trust by the United States . . . in the management and accounting of trust assets, including funds and lands . . . and to compel the defendants to provide a full and complete accounting of all trust assets . . . and to correct the balances of the [] trust fund accounts to reflect accurate balances." District Compl. ¶ 1.	"for money damages against the United States, brought to redress gross breaches of trust by the United States . . . as trustees . . . of land, mineral resources and other assets . . ." CFC Compl. ¶ 1. "[T]his case arises out of Defendant's continuing material breaches of statutory, regulatory, and fiduciary duties owed to the Nation and the Nation seeks damages for Defendant's mismanagement . . ." *Id*
Fund/Assets	*Funds/Assets*
"Involved in this action are funds and other assets, including approximately 2,900,000 acres of land . . ." *Id.* ¶ 2.	The Papago Reservation ("Sells Reservation") "consists of approximately 2,800,000 acres of land." *Id.* ¶ 10.
"These lands comprise a reservation located in the southernmost part of the State of Arizona . . ." *Id.* ¶ 3.	The San Lucy District ("Gila Bend Indian Reservation") "consists of approximately 3,800 acres of land." *Id.* ¶ 11. The San Xavier District "consists of approximately 69,189 acres of land." *Id.* ¶ 12.
"[T]hese lands have produced, inter alia, copper, other minerals, sand, and gravel, and such trust lands have been leased to third parties and to the government for rights of way, business uses, and other purposes." *Id.* ¶ 3.	"[T]he mineral rights on the Nation Reservation are managed by the Defendant as trustee . . ." *Id.* ¶ 14. "A substantial portion of the funds held by the United States in trust . . . is derived from income from tribal lands." *Id.* ¶ 15. "Income is derived from, inter alia, the sale of the natural resources and the conveyance of certain interests in the . . . land, including leases, easement, and rights of ways." *Id.* ¶ 16.
"[T]he trust funds are comprised of both judgment funds . . . and funds that receive their trust character as proceeds of trust property, specifically the lease and sale of resources or lands . . ." *Id.* ¶ 2.	"Additional assets held in trust by the United States . . . are derived from a judgment on various claims brought by the Nation against the United States . . . [T]he Indian Claims Commission approved a settlement award of $26 million ($26,000,000) on behalf of the Nation . . ." *Id.* ¶ 17.
Trust Obligations	*Trust Obligations*

"The United States unquestionably owes substantial fiduciary obligations to the Nation with respect to the management and administration of the Nation's trust funds and other assets." *Id.* ¶ 12.

"Because the United States holds the Nation's tribal lands and other assets in trust, it has assumed the fiduciary obligations of a trustee." *Id.* ¶ 15.

"The long-standing trust relationship between the United States and the Nation and the United States' resulting fiduciary duties are rooted in and derived from numerous statutes and regulations." *Id.* ¶ 16 (followed by a list of statutory and regulatory provisions).

"The statutes, regulations, and executive orders giving rise to the United States' fiduciary duties provide the 'general contours' of those duties, but the more specific details are filled in through reference to general trust law and 'defined in traditional equitable terms.'" *Id.* ¶ 18.

"These duties include . . . the duty to:

(a) a complete, accurate, and adequate historical accounting of all the trust property, with such accounting containing sufficient information to enable the Nation to readily ascertain whether the trust has been faithfully carried out;

(b) Maintain adequate books and records with respect to the trust property . . . ;

(c) Refrain from self dealing or otherwise benefitting from management of the trust property;

(d) . . . [P]reserve and protect trust property;

(e) [E]nforce claims held by the trust;

(f) Use reasonable skill and care to invest and deposit trust funds in such a way as to maximize the productivity of trust property . . . ; and

(g) . . . [E]nsure that trust property is used for the highest and best use." *Id.* ¶ 19.

"Because the United States engages in pervasive management and control of the Nation's tribal assets pursuant to federal statutes and regulations, . . . the government has assumed the fiduciary obligations of a trustee." *Id.* ¶ 18.

"The century long trust relationship between the United States and the Nation, and the resultant fiduciary responsibilities incumbent on the United States, are rooted in and derived from a number of statutes, regulations and executive orders." *Id.* ¶ 19 (followed by a list of statutory and regulatory provisions).

"The statutes, regulations, and executive orders giving rise to the United States' fiduciary duties provide the 'general contours' of those duties, but the details are filled in through reference to general trust law." *Id.* ¶ 21.

"These duties include . . . the duty to:

"c. Keep and render clear and accurate accounts with respect to the administration of the trust, by maintaining adequate books and records with respect to the trust property . . . ;

d. Furnish . . . a complete, accurate, and adequate historical accounting of all the trust property, with such accounting containing sufficient information to enable the Nation to readily ascertain whether the trust has been and is being faithfully carried out;

e. Exercise the 'highest responsibility,' care and skill in the administration of the trust;

f. Preserve the trust assets . . . ;

g. Keep the trust assets of the Nation separate from [non trust property];

h. Properly collect and deposit the trust funds of the Nation;

i. . . . [U]sing reasonable skill and care to invest and deposit trust funds in such a way

	as to maximize the productivity of trust property . . .; and j. Refrain from self-dealing . . . " *Id.* ¶ 22.
Breaches of Trust: "The United States . . . has consistently and egregiously failed to comply with these and other fiduciary obligations and continues to do so." *Id.* ¶ 20. "Its breaches of trust include . . .: (a) Failure to provide and unconscionably delaying the performance of a complete, accurate, and adequate accounting of trust property; (b) Failure to maintain adequate books and records . . .; (c) Failure to refrain from self-dealing . . .; (d) Failure to . . . preserve and protect trust property; (e) Failure to . . . bring and enforce claims held by the trust; (f) Failure . . . to invest and deposit trust funds . . . to maximize the productivity of trust property . . .; (g) Failure to ensure that trust assets are used for their highest and best use." *Id.*	*Breaches of Trust* "The United States has consistently and egregiously failed to comply with these and other fiduciary duties incumbent on a trustee . . . " *Id.* ¶ 23. "These breaches of trust include . . .: a. Failure to properly administer the trust for the benefit of the Nation; c. Failure to keep and render clear and accurate accounts . . .; d. Failure to furnish complete and accurate information . . .; e. Failure to exercise the 'highest responsibility,' care, and skill in the administration of the trust; f. Failure to preserve the trust assets . . .; g. Failure to keep trust assets of the Nation separate from [non trust property]; h. Failure to properly collect and deposit the trust funds of the Nation; i. Failure to make the assets of the trust productive . . .; j. Failure to invest and deposit trust funds in such a way as to maximize the productivity of trust property . . .; and k. Failure to refrain from self dealing . . . " *Id.*
Counts I–II: "Specifically, the defendants have, inter alia, failed to provide the Nation with a complete, accurate, and adequate accounting of the Nation's trust assets . . . ." *Id.* ¶ 36. "The Nation is entitled to a further declaration that the defendants have breached the fiduciary duties they owe to the Nation by, inter alia, failing to provide the Nation with a	*Count I–III:* "The United States, as trustee, has never provided the Nation a complete and accurate accounting of the revenue the United States collected or was required to collect under mineral leases and permits." *Id.* ¶ 28. "Defendant breached its fiduciary duty by failing to lease such property interest for fair market value and failing to collect fair and reasonable compensation for the benefit of

complete, accurate, and adequate account-ing . . . ." *Id.* ¶ 38.	the Nation." *Id.* ¶ 29.
	"The Nation is entitled to a money damage award against the United States from its mismanagement of the Nation's mineral resources in an amount to be proven at trial." *Id.* ¶ 30.
"The Nation is entitled to a further declara-tion (1) delineating the defendants' fiduciary duties to, among other things, enable proper discharge of their accounting obligation and (2) finding that the defendants have breached their duties so declared." *Id.* ¶ 39.	"The nation is entitled to a money damage award against the United States from its mismanagement of the Nation's mineral resources in an amount to be proven at trial." *Id.* ¶ 30.
"The Nation is entitled to injunctive relief directing the defendants to provide a com-plete, accurate, and adequate accounting of the Nation's trust assets . . . and to comply with all other fiduciary duties as determined by the Court." *Id.* ¶ 42.	"The United States, as trustee, has never provided the Nation a complete and accurate accounting of the revenue the United States collected or was required to collect, in grant-ing easements and rights of way and leasing tribal properties." *Id.* ¶ 33.
"The Nation is further entitled to make exceptions and objections to the ac-counting provided to a restatement of their trust fund account balances in conformity with the ultimate and complete accounting, and to any additional equitable relief that may be appro-priate (e.g., disgorgement, equitable restitu-tion, or an injunction . . .)." *Id.* ¶ 43.	"Defendant breached its fiduciary duty to lease such property interests . . . for fair market value, and to collect fair and reason-able compensation for the benefit of the Nation." *Id.* ¶ 34.
	"The Nation is entitled to a money damage award against the United States arising from its mismanagement of the non-mineral inter-ests in the Nation's trust land . . . ." *Id.* ¶ 35.
	"At no time has the United States provided the Nation a complete and accurate account-ing of judgment funds held in trust for its benefit." *Id.* ¶ 38.
"The Nation is entitled to further injunctive relief directing the defendants to bring them-selves into conformity with their fiduciary obligations and otherwise address breaches of trust found by the Court." *Id.* ¶ 44.	"[T]he United States has failed to invest, and continues to fail to invest, the principal and earnings of judgment funds held in trust, in a timely manner." *Id.* ¶ 39.
	"[T]he United States has failed to invest trust funds to obtain the maximum invest-ment returns possible . . . ." *Id.*
Prayer for Relief.	*Prayer for Relief.*
"For a decree construing the trust obli-gations of the defendants to the Nation, including but not limited to, the duty to provide a complete, accurate, and adequate accounting . . . ." *Id.* Prayer for Relief ¶ 1.	"For a determination that the Defendant is liable to the Nation in damages for the injuries and losses caused as a result of Defendant's breaches of fiduciary duty." *Id.* Prayer for Relief ¶ 1.

364

"For a decree that the United States has been in breach of its trust obligations . . . , specifically including, inter alia, its fiduciary duty to provide a complete, accurate, and adequate accounting of all trust assets. . . ." *Id.* Prayer for Relief ¶ 2.

"For a decree delineating the fiduciary duties owed by the defendants to the Nation with respect to the management and administration of the trust assets belonging to the Nation." *Id.* Prayer for Relief ¶ 4.

"For a decree providing for the restatement of the Nation's trust fund account balances in conformity with this accounting, as well as any additional equitable relief that may be appropriate (e.g., disgorgement, equitable restitution, or an injunction directing the trustee to take action against third parties). *Id.* Prayer for Relief ¶ 6.

"For a determination of the amount of damages due the Nation plus interest. . . ." *Id.* Prayer for Relief ¶ 2.

"For such other and further relief as the Court deems just and appropriate." *Id.* Prayer for Relief ¶ 4.

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The two complaints clearly involve the same parties, the same trust corpus, the same asserted trust obligations, and the same asserted breaches of trust over the same period of time. The only apparent difference in the complaints is the focus in the district court on the equitable remedy of a trust accounting and, in this court, on money damages. We use the term "focus" advisedly. Despite its apparent emphasis on an accounting, the district court complaint specifically seeks money (disgorgement, restatement of accounts, and restitution). The complaint here, although focusing on money damages, alleges a breach through failure to provide an adequate trust accounting and it seeks relief which, as explained below, will require an accounting in aid of judgment. Whether the differences in focus are sufficient, under section 1500 jurisprudence, to prevent the overwhelming similarities from triggering the jurisdictional bar is discussed below.

DISCUSSION

The Jurisdiction of the Two Courts

This court has jurisdiction under the Indian Tucker Act, 28 U.S.C. § 1505 (2000), to allow Native American tribes the right to bring suit in the Court of Claims like any other plaintiff. *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) ("the Indian Tucker Act, confers a like waiver for Indian tribal claims that 'otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe'"). This is only a jurisdictional grant to the court, however. Like the general Tucker Act, 28 U.S.C. § 1491 (2000), it is not the substance of the cause of action; that must be

found elsewhere in law.[3] In Indian trust accounting cases, absent a special jurisdictional statute, a common device in the past century, the substantive right must be found in statutes from which a trust relationship can be inferred, and one which can reasonably be construed to imply a money remedy for breach. *See United States v. Mitchell*, 463 U.S. 206 (1983).

Under none of its broader jurisdictional grants does this court have general equitable powers. This means, as plaintiff correctly points out, that the court cannot simply order an accounting as stand-alone relief. Instead, "the court has the power to require an accounting in aid of its jurisdiction to render a money judgment on that claim." *Klamath & Modoc Tribes v. United States*, 174 Ct. Cl. 483, 490-91 (1966); *see also The American Indians Residing on Maricopa-Ak Chin Reservation v. United States*, 229 Ct. Cl. 167, 169 (1981). It is presumably this power which plaintiff invokes in its complaint here, when, for example it recites that,

> the United States, as trustee, has never provided the Nation a complete and accurate accounting of the revenue the United States collected . . . under mineral leases and permits. . . . Defendant breached its fiduciary duty by failing to lease such property interest for fair market value. . . . The Nation is entitled to a money damage award against the United States arising from its mismanagement of the Nation's mineral resources in an amount to be proven at trial.

CFC Compl. ¶¶ 28-30.

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[3] "It is enough, then, that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages." *White Mountain Apache*, 537 U.S. at 473.

Assuming that the plaintiff persuades this court that the statutory framework gives rise to a trust, the breach of which is remediable by the payment of money, the court then will have to hear detailed evidence from both sides about how the United States performed as trustee. The United States, as trustee, would have to meet plaintiff's prima facie case of breach with a full accounting for its conduct. In short, assuming this action were to proceed in this court, and plaintiff satisfied its burdens of proof, what would ensue would amount to an accounting, albeit in aid of judgment.

As to the district courts, Congress enacted a statute in 1966 giving them jurisdiction to hear suits brought by tribes arising under the Constitution, laws or treaties of the United States. *See* 28 U.S.C. § 1362 (2000) ("section 1362"). Native American tribes thus may bring suit in district court like any other plaintiff. *See Sac & Fox Nation of Okla. v. Cuomo*, 193 F.3d 1162, 1165 n.3 (10th Cir. 1999) ("[28 U.S.C. § 1362] affords jurisdiction of suits by Indian Tribes that involve federal questions"). Like the Tucker Act and the Indian Tucker Act, section 1362 has been treated as waiving sovereign immunity but not creating a cause of action. The cause of action must come from some other provision in law that is within the jurisdiction of the district court. In this case, plaintiff cites 28 U.S.C. § 1331 ("section 1331") (federal question jurisdiction) and 5 U.S.C. § 706 (actions under the Administrative Procedures Act).

Judicial review under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 500 *et seq.* (2000), is available "when there is no other adequate remedy in a court." *Id.* § 704. Jurisdiction is unavailable, however, under the APA when the action seeks "money damages." *See*

id. § 702. Presumably, this is what prompts plaintiff to urge us to ignore as "non-operative" those portions of the district court complaint that appear to seek money. It is unclear, however, whether plaintiff genuinely does not seek any monetary relief from the district court, or if plaintiff wants monetary relief but views it as different than what is available here and thus not problematic under the APA. During oral argument, the court asked plaintiff's counsel if plaintiff would be willing to disavow monetary relief in the district court. Counsel declined to do so:

> [T]he government says that equitable remedies, like disgorgement and restitution, are monetary relief. We think that's dead wrong, but if that's what they mean by "monetary relief," then I can't agree that we're not seeking those equitable—what we view as equitable and they view as monetary—then I certainly can't agree that we're not seeking that in District Court. We are entitled to the full panoply of remedies that a court of equity has.

Tr. 37-38, Oct. 3, 2007. This is consistent with the district court prayer for relief, in which plaintiff asks for a decree providing for a restatement of account balances in conformity with the accounting balances and for "any additional equitable relief that may be appropriate (e.g. disgorgement, equitable restitution, or an injunction . . .)." District Compl. Prayer for Relief ¶ 6. There is thus nothing "inoperative" about this request, or the allegations of mismanagement and self-dealing that lead up to it.

In any event, for purposes of section 1500, even if the district court does not have jurisdiction over the monetary relief sought, it is the "relief requested," *Keene*

Corp. v. United States, 508 U.S. 200, 212 (1993), not the "relief available" that is relevant. *See Frantz Equip. Co. v. United States*, 120 Ct. Cl. 312, 314 (1951) ("The applicability of [section 1500] . . . is not conditioned upon the question of whether the District Court had jurisdiction of the claim asserted by the plaintiff therein"). Indeed, even if the district court action had been dismissed in the interim, the inquiry would still be whether, assuming section 1500 is a bar, the district court proceeding was pending at the time the action in this court was initiated.[1]

Section 1500

Section 1500 deprives the court of jurisdiction "of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States. . . . " 28 U.S.C. § 1500. Section 1500 thus protects the United States from being forced to defend against duplicative suits.

The history of section 1500 is nearly as long and storied as that of this court and its predecessor, the United States Court of Claims. Following the Civil War, owners of seized southern cotton brought suit under The Captured and Abandoned Property Act of 1863 for the

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[1] Even if any misgivings we had about the district court's jurisdiction to grant monetary relief, *see The Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 139 n.10 (2004), were relevant under section 1500, as plaintiff points out, under *Bowen v. Massachusetts*, 487 U.S. 879 (1988), it is not inconceivable that the district court could construe the request for monetary relief as not "money damages" under the APA. While this might persuade the district court to retain jurisdiction, it does not mean that the plaintiff does not seek money. As we discuss below, we view the concerns of section 1500 to be the overlap in the ultimate relief, however characterized in terms of legal theory.

value of the seized cotton upon a showing that the claimant had not given aide to the Confederacy. *See* Paul F. Kirgis, *Section 1500 and the Jurisdictional Pitfalls of Federal Government Litigation*, 47 Am. U. L. Rev. 301, 303 (1997). Many claimants also brought suit in the local district courts against the Treasury officers who had seized the property. *Id.* In response, Congress in 1868 adopted the predecessor to what is now codified as section 1500.[5]

The feature of section 1500 that is controverted here is the question of whether the complaints involve the same "claim." The first reported decision of the modern era dealing with the meaning of the term "claim" in section 1500 was *British American Tobacco v. United States*, 89 Ct. Cl. 438 (1939).[6] The Court of Claims there held that the contract suit was barred when another action in district court sought monetary recovery in tort based on the same set of operative facts. *Id.* at 440. "[T]he word 'claim,' as used in [the statute] has no reference to the legal theory upon which a claimant seeks to enforce his demand if it appears, as it does here, that the defendant in a suit in another court was, in respect of the subject matter or property in respect of which the claim was made . . . . " *Id.* The "operative facts" or "subject matter" of the claim were thus the determinative factor rather than the legal theory asserted.

In *Casman v. United States*, 135 Ct. Cl. 647 (1956), the court held that the plaintiff's claim for back pay was not barred by section 1500 even when a suit based on the identical set of facts for employment reinstatement was

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[5] 15 Stat. 75, 77 (June 25, 1868).

[6] The statute applied in *British American* was a predecessor to section 1500 and was the same in substance as 28 U.S.C. § 1500.

pending in district court. *Id.* at 650. The court noted that the purpose of section 1500 was to force plaintiffs to elect between the Court of Claims and another court in which to pursue its whole claim against the government. *Id.* at 649 (citing *Matson Navigation Co. v. United States*, 284 U.S. 352, 355-56 (1932)). The plaintiff's suit in the Court of Claims was not barred because the equitable relief requested in district court was not available in the Court of Claims. *Id.* at 650. The court stated that section 1500 did not require plaintiffs to elect between monetary and equitable relief. *Id.*

In *Johns-Manville Corp. v. United States*, 855 F.2d 1556 (Fed. Cir. 1988), the Federal Circuit upheld the dismissal of plaintiff's suit for contractual indemnification in the United States Claims Court[7] because plaintiff had pending a claim based on the identical facts brought under the Federal Tort Claims Act[8] in district court. *Id.* at 1567-68. Both complaints sought recovery of costs and expenses. The Federal Circuit revisited section 1500 in *The Boston Five Cents Sav. Bank, FSB v. United States*, 864 F.2d 137 (1988). There, the Federal Circuit allowed a suit for money damages in the Claims Court while a similar suit seeking declaratory judgment was pending in the district court. *Id.* at 139-40 (citing *Casman*, 135 Cl. Ct. [*sic*] at 649-50). The court held that although the complaints were identical, *Johns-Manville* did not apply because monetary damages were only available in the Claims Court. *Id.* at 140.

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[7] Prior to 1982, this court was known as the United States Claims Court. We refer to the court as it was called at the time of decision cited.

[8] Codified at 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), 2671-80 (2000).

The issue reached the Supreme Court in *Keene Corp. v. United States*.[9] The Court held that "dismissal would turn on whether the plaintiff's other suit was based on substantially the same operative facts as the Court of Claims action, at least if there was some overlap in the relief requested. That the two actions were based on different legal theories did not matter." 508 U.S. at 212 (citing *British American*, 89 Ct. Cl. at 440) (internal citations omitted). Because the issue was not before it, the Court declined to "decide whether two actions based on the same operative facts, but seeking completely different relief, would implicate § 1500." *Id.* at 213 n.6. The Court limited *Casman* to situations in which the relief was completely different in both suits. *Id.* at 214 n.9, 216 (citing *Johns-Manville*, 855 F.2d at 1566-67; *Boston Five Cents*, 864 F.2d at 139).

The Court also addressed the concern that section 1500's anachronistic character prevented some claimants from asserting rights that Congress had otherwise granted them.[10] The Court dismissed this argument,

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[9] In *Keene*, the plaintiff had been sued in district court by various individuals for asbestos related injuries. Plaintiff filed a third-party complaint against the United States seeking indemnification because it used the asbestos pursuant to government specifications. It subsequently filed two complaints in the Court of Claims (eventually transferred here) seeking damages from the cost of litigating and settling the asbestos litigation. The Court held that claims in this court were barred by the application of section 1500. 508 U.S. at 202.

[10] The court stated that the trial judge in *Keene* was not the first to call the statute "anachronistic" and even noted that some have argued that the statute has never really performed its intended function. 508 U.S. at 217 (citing *A.C. Seeman, Inc. v. United States*, 5 Cl. Ct. 386, 389 (1984)); *see also* Gregory Schwartz, Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents, 55 Geo. L.J. 573, 579 (1967).

stating that, "the 'proper theater' for such arguments, as we told another disappointed claimant many years ago, 'is the halls of Congress, for that branch of the government has limited the jurisdiction of the Court of Claims.'" *Id.* at 217 (quoting *Smoot's Case*, 82 U.S. 36, 45 (1873)).

The Federal Circuit subsequently addressed section 1500 in light of the *Keene* decision in *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545 (1994). In *Loveladies*, the plaintiff was denied a wetlands development permit and filed suit in the District Court for the District of New Jersey, challenging the denial under the APA. While an appeal was pending before the Third Circuit, the owner brought suit in the Claims Court under a theory of regulatory taking.[11] This court heard the case, ruled for plaintiff, and awarded damages. The government appealed on the basis of section 1500. The Federal Circuit articulated a two-part test for the application of section 1500. "For the Court of Federal Claims to be precluded from hearing a claim under § 1500, the claim pending in another court must arise from the same operative facts, and must seek the same relief." 27 F.3d at 1551. Applying the test, the Federal Circuit upheld the judgment in plaintiff's favor, holding that the two complaints sought entirely different relief. *Id.* at 1554.

Plaintiff seizes on the use of the term, "same relief" in *Loveladies*, arguing, in effect, that the relief must be identical before section 1500 is triggered. Plaintiff ignores, however, other language in *Loveladies*. The court described the issue as "whether § 1500 denies jurisdiction to the Court of Federal Claims if, at the time a com-

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[11] *See* 21 Cl. Ct. 153 (1990).

plaint for money damages is filed, there is a pending action in another court that seeks *distinctly different relief*." *Id.* at 1549 (emphasis supplied). Elsewhere the court iterates the inquiry: "If the claims are distinctly different, Loveladies are excused from the jurisdictional dance required by § 1500." *Id.* The two suits, were, of course, distinctly different. The district court proceeding was a routine suit for injunctive and declaratory relief under section 1331 and the APA; the suit here sought compensation for a taking.

In short, we have to assume that the Federal Circuit intended by "same relief" to mean that two complaints seek relief that is not "distinctly different." That reading of *Loveladies* is, in any event, compelled by the controlling language of *Keene*. The Court viewed the precedent as dictating dismissal when "plaintiff's other suit was based on substantially the same operative facts . . . at least if *there was some overlap in the relief requested*. . . . Congress did not intend the statute to be rendered useless by a narrow concept of identity. . . . " 508 U.S. at 212-13 (emphasis supplied). Later, the Court noted that the *Casman* exception applied when a plaintiff sought "distinctly different types of relief" in the two courts. *Id.* at 214 n.9.

In sum, we believe that the inquiry is whether there is meaningful overlap both in the underlying facts and in the relief sought in the two actions. A perfect symmetry of demands for relief is not necessary.

As we indicated above, there can be no meaningful dispute about the first prong of the claim test: the operative facts asserted in the complaint are, for all practical purposed, identical. Plaintiff has included language in both complaints alleging mismanagement and lack of

prudent investment. *Compare* District Compl. ¶¶ 1-4, 20 *with* CFC Compl. ¶¶ 1, 23 (both complaints include the duties to account, keep adequate records, refrain from self-dealing, preserve trust assets, and invest prudently as to maximize return). Both complaints allege breaches of the same previously listed duties. *Compare* District Compl. ¶ 20 *with* CFC Compl. ¶ 23. It is also undisputed that plaintiff is alleging these breaches in relation to the same trust corpus (lands, buildings, mineral resources, rights in property, and tribal funds). The underlying facts are the same.

We view plaintiff's real argument to be that, because, traditionally, district courts do equity and this court gives monetary relief, whatever relief the district court grants is *per se* not duplicative of what this court can do. The fact that the plaintiff has asked for what looks like overlapping relief (money and an accounting in both courts) thus becomes immaterial. As a matter of law, the powers of the courts are different so there cannot be the same "claim" pending for purposes of section 1500.

There are at least two major problems with that approach. The first we have already discussed. Under section 1500, the courts is not obligated to parse the complaint to eliminate allegations or requests for relief that are jurisdictionally unsound. The language of the complaints controls. Moreover, for section 1500 purposes, the legal theory behind the allegations or the characterizations of the requests for relief are not controlling. As a practical matter, will the same background facts be relevant, and will the relief, in substance, be the same? Here, we think it is obvious that there is virtually 100 percent overlap.

The more principled reason that this literal application of section 1500 is appropriate has to do with the unique character of Indian trust claims. Unlike regulatory disputes, suits brought by Indian tribes, claiming a breach of trust, do not neatly separate between the exclusively injunctive relief typical in a district court APA review of agency action on the one hand, and, on the other hand, a suit here for money damages flowing from the consequences of that agency action. In substance, the action for breach of trust in this court is an equitable proceeding that produces a monetary remedy. Thus while the court has jurisdiction because of the demand for money, the process for getting to that relief is fundamentally equitable, meaning that there is potential overlap of both the accounting and money aspects of the two complaints.

Even though a traditional common law breach of trust claim is an action in equity, *see Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 567 (1990), equitable remedies for breach of trust include the recovery of money. As is explained in the Restatement (Second) of Trusts, in addition to seeking purely injunctive or declaratory relief, the beneficiary can recover any loss or depreciation in value of the trust estate resulting from the breach of trust, any profit made by the trustee, or any profit which would have accrued to the trust estate if there had been no breach of trust. Restatement (Second) of Trusts § 205 (1959).[12]

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[12] *See* Comments to § 205:

a. Alternative remedies for breach of trust. If the trustee commits a breach of trust, the beneficiary may have the option of pursuing a remedy which will put him in the position in which he was before the trustee committed the breach of trust; or of pursuing a remedy which

Section 205 of the Restatement's revision of the Prudent Investor Rule makes clear that a trustee can be held responsible to the beneficiary for "the amount required to restore the values of the trust estate and trust distributions to what they would have been if the trust had been properly administered." Restatement (Third) of Trusts, Prudent Investor Rule § 205(b) (1992). The comments to that section support our holding that the equitable relief available for a breach of trust includes profits lost due to mismanagement and improper investment:

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will give him any profit which the trustee has made by committing the breach of trust; or of pursuing a remedy which will put him in the position in which he would have been if the trustee had not committed the breach of trust.

. . . .

Comment on Clause (e):

i. Failure to make a profit. If the trustee commits a breach of trust, he is chargeable with any profit which would have accrued to the trust estate if he had not committed such a breach of trust.

This rule is applicable to income as well as principal. Thus, if the trustee in breach of trust fails to make the trust property productive he is liable for the amount of income which he would have received if he had not committed the breach of trust (see § 207).

The same point is stated in Pomeroys Equity Jurisdiction § 158:

A court of equity will always by its decree declare the rights, interests, or estate of the *cestui que trust*, and will compel the trustee to do all the specific acts required of him by the terms of the trust. It often happens that the *final* relief to be obtained by the *cestui que trust* consists in a recovery of money. This remedy the courts of equity will always decree when necessary, whether it is confied to the payment of a single specific sum, or involves an accounting by the trustee for all that he has done in pursuance of the trust. . . .

John N. Pomeroy, A Treatise on Equity Jurisprudence § 158 (Spencer Symons ed., 5th ed. 2002).

> If the breach of trust causes a loss, including any failure to realize income, capital gain, or appreciation that would have resulted from proper administration, the beneficiaries may surcharge the trustee for the amount necessary to compensate fully for the consequences of the breach. Thus, the recovery for an improper investment by a trustee would ordinarily be the difference between (1) the value of the investment and its income and other product at the time of surcharge and (2) the amount of the funds expended in making the investment, increased (or decreased) by the amount of the total return (or negative total return) that would have accrued to the trust and its beneficiaries if the funds had been properly invested.

Id. § 205 cmt. i.

Sections 208-211 of the Restatement (Second) deal specifically with liability of the trustee for selling property it was his duty to retain, liability for failing to sell trust property that he had a duty to sell, liability for purchasing property it was not his duty to purchase, and liability for failing to purchase property it was his duty to purchase.[11] *See also* Restatement (First) of Restitu

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[11] Section 207, Liability for Interest, presupposes a monetary recovery for breach of trust:

> (1) Where the trustee commits a breach of trust and thereby incurs a liability for a certain amount of money with interest thereon, he is chargeable with interest . . . .
>
> (2) Where the trustee is chargeable with interest, he is chargeable with simple and not compound interest, unless
>
> (a) he has received compound interest, or
>
> (b) he has received a profit . . . , or
>
> (c) it was his duty to accumulate the income.

tion § 49(f) (1937) (stating that a person entitled to restitution may received a number of remedies including "decree in equity for the payment of money").

In short, not only can the trustee be forced to return money to the trust account, the trustee can also be compelled to put new money into the account.[14] Thus the aspects of the district court request for relief, which plaintiff characterizes as unique because they arise in equity, are nevertheless the same requests for relief which give this court jurisdiction. The fact that the money comes from a cause of action in equity is immaterial. This is a critical part of the holding in *White Mountain Apache*, where Justice Souter wrote that, once a specific fiduciary duty is established, "general trust law [is to be] considered in drawing the inference that Congress intended damages to remedy a breach of obligation." 537 U.S. at 477. *See also Mitchell*, 463 U.S. at 225-26 (holding that the fiduciary obligations at issue could be fairly interpreted as mandating compensation, given that the existence of a trust exposes the trustee to liability for damages should it breach its obligations)

Restatement (Second) of Trusts § 207 (1959).

[14] At oral argument, plaintiff's counsel attempted to assure the court that monetary relief in district court would consist only of money already somewhere in the government's possession (old money), and that the money damages in this court would consist entirely of "new money," *i.e.*, money that should have been earned but never was. Regardless of plaintiff's intent, it is without question that equitable remedies for breach of trust, as shown by the above quoted authorities, are concerned with far more than just "old money." Similarly, in this court, no distinction is to be found between money "old" and "new." Rather, if successful, a plaintiff is made whole, to the extent possible, by the payment of money for the government's breaches of trust. That remedy is sought in both courts and thus section 1500 is implicated.

(citing Restatement (Second) of Trusts §§ 205-212 (1959)); *The Navajo Nation v. United States*, 501 F.3d 1327, 1343 (Fed. Cir. 2007) ("Where the government exercises actual control within its authority neither Congress nor the agency needs to codify such actual control for a fiduciary trust relationship that is enforceable by money damages to arise") (citing *White Mountain Apache*, 537 U.S. at 475); *The Shoshone Indian Tribe of the Wind River Reservation v. United States*, 58 Fed. Cl. 77, 82 (2003) (holding that plaintiff had established the existence of fiduciary duties and that it could thus recover money damages for any breach of those duties).

Plaintiff's argument, that, under *Bowen*, the transfer of money does not change equitable relief into money damages, *see* 487 U.S. at 893-94, is thus irrelevant. Although the Court held that the term "money damages" found in 5 U.S.C. § 702 was distinct from the more general meaning of "monetary relief," 487 U.S. at 896-901, section 1500 makes no such distinction.

As this court has held, and the Supreme Court has acknowledged, it is the form of the relief (money) that is relevant. *Harbuck v. United States*, 58 Fed. Cl. 266, 269 (2003) (citing *Keene*, 508 U.S. at 212), *aff'd*, 378 F.3d 1324 (2004). However characterized, the calculus involved in determining how much money the plaintiff is owed would be the same in both courts. Although plaintiff refers to the money requested here as "damages," the action here is for a breach of trust, and the means for proving breach and financial injury would be the same as in the district court.[15]

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[15] "The inclusion of other and different requested relief in the two complaints does not avoid the application of [section 1500]. As long as the same relief is sought in both cases –here money damages –the sec-

In addition, as we discussed above, although a pre-liability, stand-alone general accounting is unavailable in this court, after a presentation of sufficient evidence, an accounting is unavoidable here and will be coextensive with all the plaintiff's claims of breach. The accounting is necessary to establish the quantum of damages. Independent, therefore, of the monetary relief aspects of the two complaints, there is overlap in the request for an accounting. Both actions, in sum, seek a restatement of accounts, restitution, and disgorgement and both will require an accounting. There is plainly substantial overlap in the operative facts as well as in the relief requested. That being the case, unfortunately for plaintiff, section 1500 is a bar.[16]

CONCLUSION

Section 1500 divests this court of jurisdiction over plaintiff's claim because it arises from the same operative facts and seeks the same relief as the claim in district court. Accordingly, defendant's motion to dismiss is granted. The clerk is directed to dismiss the complaint without prejudice for lack of jurisdiction pursuant to RCFC 12(b)(1). No costs.

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ond prong of the [section 1500] requirement . . . is satisfied." *Harback v. United States*, 378 F.3d 1324, 1329 (Fed. Cir. 2004) (citing *Keene*, 508 U.S. at 212) (internal citations omitted).

[16] We recognize that, if the filing dates of the complaints had been reversed, section 1500 would not be a problem and the two courts would use traditional principles of comity, collateral estoppel, and res judicata to sort out any duplication. While this illustrates the lack of need for section 1500 and its arbitrariness, we can do no more than make this observation and suggest that plaintiff attempt a legislative solution through a congressional reference or a new jurisdictional statute.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2008-5043

TOHONO O'ODHAM NATION, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

[Filed Aug. 18, 2009]

Appeal from the United States Court of Federal Claims in 06-CV-944, Senior Judge Eric G. Bruggink

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ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellee, and a response thereto having been invited by the court and filed by the Appellant, and the petition for rehearing and response, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on August 25, 2009.

FOR THE COURT,

JAN HORBALY
JAN HORBALY
Clerk

Dated: 08/18/2009

cc: Keith M. Harper
Aaron P. Avila

APPENDIX D

UNITED STATES COURT OF FEDERAL CLAIMS

No. 06-944 L

THE TOHONO O'ODHAM NATION, PLAINTIFF

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Dec. 29, 2006]

COMPLAINT FOR DAMAGES FOR BREACH OF TRUST OBLIGATIONS

I. GENERAL NATURE OF THE ACTION

1. This action is an action for money damages against the United States, brought to redress gross breaches of trust by the United States, acting by and through Dirk Kempthorne, Secretary of the Interior ("Kempthorne"), Ross Swimmer, Special Trustee for American Indians ("Swimmer"), and Henry M. Paulson, Secretary of the Treasure ("Paulson"), and their predecessors in office and subordinates, as trustees and trustee-delegates of land, mineral resources and other assets held by them for the benefit of the Tohono O'odham Nation ("Nation"). As set forth more fully below, this case arises out of Defendant's continuing material breaches of statutory, regulatory, and fiduciary duties owed to the Nation and the Nation seeks damages

for Defendant's mismanagement of the Nation's trust property.

II. THE PARTIES

2. Plaintiff, the Nation, formerly known as the Papago Tribe, is a federally recognized Indian tribe with over 26,000 members. It is the beneficiary of real property, and the proceeds therefrom, held by the United States as trustee.

3. Defendant United States acts as trustee for certain tribal lands, monies, and other assets belonging to the Nation. The United States has principally delegated its trust responsibilities to the Secretary of the Interior and the Secretary of the Treasury.

4. Mr. Kempthorne is the Secretary of the Interior, and chief officer of the Department of the Interior. As such, Secretary Kempthorne is charged by law with, *inter alia*, carrying out the duties and responsibilities of the United States as trustee for the plaintiff.

5. Mr. Swimmer is the Special Trustee for American Indians, a sub-cabinet level officer appointed by the President of the United States with the advice and consent of the Senate, who reports directly to the Secretary of the Interior. Some of Mr. Swimmer's duties are delineated in the Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. §§ 4041-46 (2000).

6. Mr. Paulson is the Secretary of the Treasury, and as such is the custodian of trust funds. Secretary Paulson is, *inter alia*, responsible for maintaining records in connection with such funds.

III. JURISDICTION

7. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1491 and 1505.

8. The United States has waived its sovereign immunity under 28 U.S.C. §§ 1491 and 1505. *See United States v. Mitchell*, 463 U.S. 206, 228 (1983) ("*Mitchell II*").

IV. THE TRUST OBLIGATIONS OF THE UNITED STATES WITH RESPECT TO THE NATION

9. The tribal lands of the Nation were established by several Executive Orders and Acts of Congress issued between 1874 and 1955. These tribal lands are composed of non-contiguous areas in Southern Arizona, including the San Lucy District, the San Xavier District, and the Papago Reservation (collectively the "Nation Reservation"). The Nation Reservation is the second largest Indian reservation in the Untied States.

10. The Papago Reservation, also known as the Sells Reservation, is the largest segment of the Nation Reservation, and it occupies portions of Maricopa, Pinal, and Pima Counties in Arizona. This segment of the Nation Reservation was initially established by Executive Order of January 14, 1916 by President Woodrow Wilson, and its boundaries were subsequently modified by additional Executive Orders and Acts of Congress. It currently consists of approximately 2,800,000 acres of land and is considered the "main reservation."

11. The San Lucy District, also known as the Gila Bend Indian Reservation, is a non-contiguous segment of the Nation Reservation, and is separated from the main reservation. This portion of the Nation Reservation lies near Gila Bend, Arizona. It was initially formed

by Executive Order of December 12, 1882 by President Chester A. Arthur and reduced in size by Executive Order of June 17, 1909, by President William Howard Taft. It currently consists of approximately 3,800 acres of land.

12. The San Xavier District is a non-contiguous segment of the Nation Reservation and is separated from the main reservation. This portion of the Nation Reservation, originally formed through Executive Order of July 1, 1874 by President Ulysses S. Grant, is west of Tucson, Arizona, and consists of approximately 69,189 acres of land.

13. The Nation Reservation is held in trust by the United States for the benefit of the Nation, and it is managed by the Department of the Interior.

14. Pursuant to Act of Congress of May 27, 1955, Pub. L. No. 106-47, 69 Stat. 67 (repealing 25 U.S.C. § 463(b)(1)-(2)), Congress clarified that the mineral estate of the Nation's lands belong to the Nation. Consequently, the mineral rights on the Nation Reservation are managed by the Defendant as trustee for the benefit of Nation.

15. A substantial portion of the funds held by the United States in trust for the Nation is derived from income from tribal lands. Title to the land comprising the Nation Reservation is held in trust by the United States, with the Nation as beneficial owner of the land and associated natural resources, which include, *inter alia*, valuable mineral reserves, such as copper, other minerals, sand, and gravel.

16. Income is derived from, *inter alia*, the sale of the natural resources and the conveyance of certain inter-

ests in the Nation's tribal trust land, including leases, easements, and rights of ways. These assets, and the income they produce, form the core of the Nation's tribal trust assets.

17. Additional assets held in trust by the United States for the Nation's benefit are derived from a judgment on various claims brought by the Nation against the United States. This includes claims brought under the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049 (1946). On July 21, 1976, the Indian Claims Commission approved a settlement award of $26 million ($26,000,000) on behalf of the Nation as compensation for 6.3 million acres of aboriginal tribal lands that were taken by the United States. *See Papago Tribe of Ariz. v. United States*, Docket Nos. 102, 345, 38 Ind. Cl. Comm. 542, 542-43 (1976). Funds to cover the award were appropriated on September 30, 1976. Act of Sept. 30, 1976, 90 Stat. 1416 (1976). The United States undertook to manage, invest, and distribute these judgment funds as trust assets for the benefit of the Nation. On January 3, 1983, Congress enacted legislation requiring that fifty percent (50%) of the judgment funds be held in trust by the Secretary of Interior for the benefit of the Nation and be "administered or invested by the Secretary for the best interest of the tribe under existing law." Act of Jan. 3, 1983, Pub. L. No. 97-408, § 8, 96 Stat. 2035, 2035 (1983). The remaining fifty percent of such funds were to be held and administered by the Secretary for per capita distribution. *Id.*

18. Because the United States engages in pervasive management and control of the Nation's tribal assets pursuant to federal statutes and regulations, as more fully described below, the government has assumed the

fiduciary obligations of a trustee. *Mitchell II*, 463 U.S. at 225. As a trustee, the United States is charged with "'moral obligations of the highest responsibility and trust' . . . and its conduct 'should therefore be judged by the most exacting fiduciary standards.'" *Cobell v. Norton*, 240 F.3d 1081, 1099 (D.C. Cir. 2001) (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)) ("*Cobell VI*").

19. The century-long trust relationship between the United States and the Nation, and the resultant fiduciary responsibilities incumbent on the United States, are rooted in and derived from a number of statutes, regulations and executive orders. *See, e.g.*, Indian Nonintercourse Act, 25 U.S.C. § 177; Indian Long-Term Leasing Act, 25 U.S.C. § 396; Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-96g; Federal Oil & Gas Royalty Management Act, 30 U.S.C. § 1701, *et seq.*; Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-08; Indian Trust Fund Managment Reform Act of 1994, 25 U.S.C. §§ 161a, 162a, 4001-61; 25 U.S.C. § 152; 25 U.S.C. §§ 157-58, 160; 25 U.S.C.§§ 155-55b; 25 U.S.C. §§ 161a, 161b, 162a, 413; 25 U.S.C. §§ 311-12, 318a, 319, 321, 323-28; 25 U.S.C. § 397; 25 U.S.C. § 398, 398a-98e; 25 U.S.C. § 399; 25 U.S.C. §§ 415-16j; 31 U.S.C. § 1321(a); 25 C.F.R. pt. 87; 25 C.F.R. pts. 150-51; 25 C.F.R. pt. 162; 25 C.F.R. pt. 166; 25 C.F.R. pt. 169; 25 C.F.R. pt. 211; 25 C.F.R. pt. 216; 25 C.F.R. pt. 225; 30 C.F.R. pt. 206; and 43 C.F.R. § 3590.2. The foregoing list is representative only, and does not exhaust the potential sources of fiduciary duties owed to the Nation by the United States, as trustee for the Nation's tribal resources.

20. Among other things, the Indian Trust Fund Management Reform Act of 1994 ("Trust Reform Act") created the Office of the Special Trustee for American Indians and reaffirmed and clarified the United States' preexisting fiduciary duties as derived from the relevant statutes and treaties. *Cobell VI*, 240 F.3d at 1090, 1096. The Trust Reform Act was implemented to "'provide more effective management of, and accountability for the proper discharge of, the Secretary's trust responsibilities,' and [to] ensure proper reform measures are implemented." *Id.* at 1090 (quoting 25 U.S.C. § 4042(b)(1)). It was "a remedial statute designed to ensure more diligent fulfillment of the government's obligations. It recognized and reaffirmed what should be beyond dispute—that the government has longstanding and substantial trust obligations to Indians. . . . " *Id.* at 1098. The Trust Reform Act did not create the United States' fiduciary duties, and it does not, and was not intended to, serve as the sole source of those duties or of the Nation's rights. *Id.* at 1100.

21. The statutes, regulations, and executive orders giving rise to the United States' fiduciary duties provide the "general contours" of those duties, but the details are filled in through reference to general trust law. *Id.* at 1098-99; *Mitchell II*, 463 U.S. at 226. Where Congress, as here, has used terms of art in defining the federal government's responsibilities with respect to tribal trust funds, "[c]ourts 'must infer that Congress intended to impose on trustees traditional fiduciary duties unless Congress has unequicocally expressed an intent to the contrary.'" *Cobell VI*, 240 F.3d at 1099 (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 330 (1981)).

22. As trustee of the Nation's tribal trust assets, the Defendant owes, and has owed, since the inception of the tribal trust program, certain traditional fiduciary duties and responsibilities to Indian tribes as trust beneficiaries. The duties Defendant owes to the Nation, include, but are not limited to, the duty to:

a. Properly administer the trust;

b. Administer the trust solely in the interest of the Nation;

c. Keep and render clear and accurate accounts with respect to the administration of the trust, by maintaining adequate books and records with respect to the trust property, including, but not limited to, records of leases and other contractual arrangements giving rise to income from the trust property and records of the investment of tribal trust assets;

d. Furnish complete and accurate information to the Nation as to the nature and amount of trust assets, by performing a complete, accurate, and adequate historical accounting of all the trust property, with such accounting containing sufficient information to enable the Nation to readily ascertain whether the trust has been and is being faithfully carried out;

e. Exercise the "highest responsibility," care, and skill in the administration of the trust;

f. Preserve the trust assets and protect them from loss, theft, or damage;

g. Keep the trust assets of the Nation separate from other property not subject to the trust;

h. Properly collect and deposit the trust funds of the Nation;

i. Make the assets of the trust productive for the benefit of the Nation, by using reasonable skill and care to invest and deposit trust funds in such a way as to maximize the productivity of trust property within the constraints of law; and

j. Refrain from self-dealing or otherwise benefitting from management of trust property.

V. BREACHES OF TRUST BY THE DEFENDANT

23. The United States has consistently and egregiously failed to comply with these and other fiduciary duties incumbent on a trustee and imposed on the Untied States by statute, and it continues to violate the Nation's rights as beneficiary of the trust. These breaches of trust include, but are not limited to:

a. Failure to properly administer the trust for the benefit of the Nation;

b. Failure to administer the trust solely in the interest of the Nation;

c. Failure to keep and render clear and accurate accounts with respect to the administration of the trust;

d. Failure to furnish complete and accurate information to the Nation as to the nature and amount of trust assets;

e. Failure to exercise the "highest responsibility," care, and skill in the administration of the trust;

f. Failure to preserve the trust assets and protect them from loss, theft, or damage;

g. Failure to keep the trust assets of the Nation separate from other property not subject to the trust;

h. Failure to properly collect and deposit the trust funds of the Nation;

i. Failure to make the assets of the trust productive for the benefit of the Nation;

j. Failure to invest and deposit trust funds in such a way as to maximize the productivity of trust property within the constraints of law; and

k. Failure to refrain from self-dealing or otherwise benefiting from management of trust property.

24. By reason of the Defendant's egregious breaches of its fiduciary duties owed to the Nation, the Plaintiff has been damaged in such amounts as may be proven at trial plus interest as allowed by law.

COUNT I

Damages Resulting from the United States' Breach of Fiduciary Duty with Respect to the Management of the Nation's Mineral Estate.

25. All allegations set forth in paragraphs 1 through 24 of this Complaint are incorporated by reference as if fully set forth herein.

26. The United States has maintained a comprehensive regulatory framework for the pervasive control over the management of the natural resources, including mineral rights, on the Nation's land held in trust by Defen-

dant. This includes, but is not limited to, management of copper, sand, and gravel resources.

27. As trustee, the United States has entered into and approved leases and issued permits to third parties for the removal of mineral resources from the Nation's trust property. Compensation for the lease interests and payments for the removal of such resources are to be paid to the United States as trustee for the Nation. Such funds are required to be collected and deposited in the United States Treasury in trust for the benefit of the Nation. The United States continues to hold funds belonging to the Nation, including funds derived from the lease and removal of mineral estates, in trust for the benefit of the Nation.

28. The United States, as trustee, has never provided the Nation a complete and accurate accounting of the revenue the United States collected or was required to collect, under mineral leases and permits. Nor has it provided the Nation complete records of such leases and permits it is required to maintain as trustee.

29. As trustee, the United States was required to enter into and approve leases and issue permits for interests in mineral rights for not less than fair market value. However, upon information and belief, Defendant breached its fiduciary duty by failing to lease such property interest for fair market value and failing to collect fair and reasonable compensation for the benefit of the Nation. The Nation has been damaged by the failure of Defendant to obtain for the benefit of the Nation fair and reasonable compensation for its mineral resources.

30. The Nation is entitled to a money damage award against the United States arising from its mismanage-

ment of the Nation's mineral resources in an amount to be proven at trial.

COUNT II

Damages Arising from the United States' Breach of Fiduciary Duty with Respect to the Management of the Nation's Non-Mineral Estate.

31. All allegations set forth in Paragraphs 1 through 30 of this Complaint are incorporated by reference as if full [*sic*] set forth herein.

32. The United States has maintained a comprehensive regulatory framework for the pervasive control over the management of non-mineral leases and agreements for interests in land on the Nation Reservation held in trust by Defendant. This includes, but is not limited to, the negotiation of easements, rights of way, and land and building leases. *See Mitchell II*, 463 U.S. at 223.

33. The United States, as trustee, has never provided the Nation a complete and accurate accounting of the revenue the United States collected or was required to collect, in granting easements and rights of way and leasing tribal properties. Nor has it provided the Nation complete records of such transactions which it is required to maintain as trustee.

34. As trustee, the United States was required to enter into and approve leases and grant easements and rights of way for not less than fair market value. However, upon information and belief, Defendant breached its fiduciary duty by failing to lease such property interests and grant easements and rights of way for fair market value, and to collect fair and reasonable compensation for the benefit of the Nation. The Nation has been damaged by the failure of Defendant to obtain for the

benefit of the Nation fair and reasonable compensation for the use of its land.

35. The Nation is entitled to a money damage award against the United States arising from its mismanagement of the non-mineral interests in the Nation's trust land in an amount to be proven at trial plus interest as allowed by law.

COUNT III

Damages Arising from the United States' Breach of Fiduciary Duty with Respect to the Management of Judgment Funds.

36. All allegations set forth in paragraphs 1 through 35 of this Complaint are incorporated by reference as if fully set forth herein.

37. Judgments obtained against the United States have been held in trust by the United States for the benefit of the Nation. The United States, through statutes and regulations, maintains pervasive control over the management, distribution and investment of those funds. The United States is charged with exercising the highest fiduciary duty in managing these trust assets. *See Chippewa Cree Tribe of the Rocky Boy's Reservation v. United States*, 69 Fed. Cl. 639, 656 (2006).

38. At no time has the United States provided the Nation a complete and accurate accounting of judgment funds held in trust for its benefit.

39. In breach of its fiduciary duty owed to the Nation, the United States has failed to invest, and continues to fail to invest, the principal and earnings of judgment funds held in trust, in a timely manner. In addition, the United States has failed to invest trust funds to

obtain the maximum investment returns possible, consistent with its obligations as a fiduciary.

40. These breaches of fiduciary duty owed by the United States to the Nation has caused and continues to cause damage to the Nation in an amount to be proven at trial plus interest as allowed by law.

COUNT IV

Damages Arising from the United States' Breach of Fiduciary Duty with Respect to Deposit and Investment of Trust Funds.

41. All allegations set forth in paragraphs 1 through 40 of this Complaint are incorporated by reference as if fully set forth herein.

42. The United States, as trustee, maintains pervasive control over the management and investment of funds held in trust for the benefit of the Nation, including proceeds from leases, permits, easements and rights of way, judgement funds and general tribal funds as well as "Indian Moneys Proceeds of Labor" (IMPL) funds. The United States, accordingly, has undertaken the highest fiduciary obligations to invest trust funds with the care, skill, and caution that a prudent investor would exercise under the circumstances. In addition, it is and has been under an obligation to comply with federal statutes governing the investment of tribal trust assets, *see* 25 U.S.C. §§ 161a, 161b and 162a, applicable regulations, case law and the common law. *See Osage Tribes of Okla. v. United States*, 72 Fed. Cl. 629, 662 (2006).

43. The United States breached its fiduciary duty to the Nation by holding amounts of trust funds in cash, in excess of liquidity needs. As a result of that breach, the

Nation has been damaged by reason of the loss of investment of trust funds at a higher rate of return.

44. The United States breached its fiduciary duty to the Nation by failing to maximize trust income by prudent investment. *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390, 1394 (1975). The United States has, at times relevant herein, invested the Nation's trust funds at a low rate of interest. There were other investment vehicles available as permitted under 25 U.S.C. §§ 161a and 162a, including public-debt obligations of the United States and bonds, notes and other unconditionally guaranteed obligations, paying a higher rate of return. The United States was under a strict fiduciary duty to place trust funds in eligible investments maintaining higher yields. By reason of this breach of fiduciary duty, the Nation has been damaged in an amount representing the difference between what interest the United States paid for such funds and the maximum the funds could have legally and practically earned if properly invested.

45. By reason of the United States' breach of fiduciary duties in its management and investment of trust funds, the Nation is entitled to recover from the United States such damages as may be proven at trial plus interest as allowed by law.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff, the Nation, prays the Court as follows:

1. For a determination that the Defendant is liable to the Nation in damages for the injuries and losses caused as a result of Defendant's breaches of fiduciary duty;

2. For a determination of the amount of damages due the Nation plus interest as allowed by law;

3. That the cost of this action, including reasonable attorneys [*sic*] fees, be awarded to the Nation;

4. For such other and further relief as the Court deems just and appropriate.

This the [29th] day of December, 2006.

Respectfully submitted,

[ILLEGIBLE]

Keith M. Harper
Admitted to Practice in the
Court of Federal Claims
Kilpatrick Stockton, LLP
607 14th Street, N.W.
Suite 900
Washington, DC 20005
(202) 508-5800
Fax: (202) 585-0007

Attorney for Plaintiff
Tohono O'odham Nation

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 06-2236-JR

TOHONO O'ODHAM NATION,
P.O. BOX 837, SELLS, ARIZONA 85634, PLAINTIFF

v.

DIRK KEMPTHORNE, SECRETARY OF THE INTERIOR,
1849 C STREET N.W. ,WASHINGTON, D.C. 20240,

ROSS O. SWIMMER, SPECIAL TRUSTEE, OFFICE OF
THE SPECIAL TRUSTEE FOR AMERICAN INDIANS,
DEPARTMENT OF THE INTERIOR,
1849 C STREET N.W., WASHINGTON, D.C. 20240,

HENRY M. PAULSON, SECRETARY OF THE TREASURY,
1500 PENNSYLVANIA AVENUE N.W.,
WASHINGTON D.C. 20220, DEFENDANTS

[Filed: Dec. 28, 2006]

COMPLAINT

I. GENERAL NATURE OF THE ACTION

1. This is an action to seek redress of breaches of trust by the United States, acting by and through the defendants, in the management and accounting of trust assets, including funds and lands, belonging to the plain-

tiff, the Tohono O'odham Nation ("the Nation"), and to compel the defendants to provide a full and complete accounting of all trust assets belonging to the Nation and to correct the balances of the Nation's trust fund accounts to reflect accurate balances.

2. Involved in this action are funds and other assets, including approximately 2,9000,000 acres of land, held in trust by the United States for the benefit of the Nation. As is more fully set forth herein below, the trust funds are comprised of both judgment funds held in trust pursuant to federal law and funds that receive their trust character as proceeds of trust property, specifically the lease and sale of resources or lands that are held in trust. The trust funds involved are substantial; by its own estimates, as provided by government contractor Arthur Andersen LLP, the United States handled $2.1 billion ($2,100,000,000.00) in transactions for the Nation between 1972 and 1992. The United States has never fulfilled its duty to provide a full and adequate accounting of the trust funds belonging to the Nation. Accordingly, the true balances of the Nation's trust accounts are unknown and on information and belief would be far greater but for the breaches of trust complained of herein.

3. Pursuant to federal law, the defendants also have substantial fiduciary responsibilities with respect to and are charged with managing and accounting for the 2.9 million acres of land held in trust and the resources from such trust lands. These lands comprise a reservation located in the southern most part of the State of Arizona, and the Nation shares a seventy mile border with Mexico. Over the years, these lands have produced, *inter alia*, copper, other minerals, sand, and

gravel, and such trust lands have been leased to third parties and to the government for rights-of-way, business uses, and other purposes. Despite the longstanding fiduciary responsibilities owed, the United States has never provided an accounting of its management of these trust assets as required by law.

4. The defendants are government officers and trustee-delegates charged with carrying out the trust obligations of the United States. The record indicates that they have grossly mismanaged and continue to grossly mismanage the trust and have failed for over a century to carry out the most basic and fundamental trust duties owed to the Nation. The trust has been mismanaged in the following aspects, among others:

(a) The defendants have failed to provide an adequate accounting of the trust assets, including funds, lands, and resources belonging to and beneficially owned by the Nation;

(b) The defendants have breached their trust obligation to maintain adequate records and to put in place adequate accounting systems in order to properly carry out their fiduciary obligations, including their duty to account;

(c) The defendants have failed to fulfill their duty to ensure that tribal trust property and trust funds are protected, preserved, and managed so as to produce a maximum return to the Nation consistent with the trust character of the property;

(d) The defendants have failed to properly collect, invest, and disburse trust funds belonging to the Nation in compliance with their fiduciary responsibilities and other federal statutory and regulatory law;

(e) The defendants have breached their trust responsibility to preserve and protect adequate records of the trust and have spoliated irreplaceable trust records bearing upon their breaches of trust complained of herein; and

(f) The defendants have failed to properly state the Nation's account balances and have converted to their own use trust funds belonging to the Nation, including, but not limited to, Indian moneys, proceeds of labor, 25 U.S.C. § 155.

II. THE PARTIES

5. The Plaintiff is the Tohono O'odham Nation, a federally recognized Indian tribe that is the beneficial owner of funds and other assets that are held in trust on the Nation's behalf by the United States and for which the Nation has never received an adequate accounting as required by law.

6. Defendant Dirk Kempthorne is the Secretary of the Interior and chief officer of the Department of the Interior, and as such is charged by law with carrying out the duties and responsibilities of the United States as trustee for the Nation. He and his subordinates have custody and control of trust assets, including trust funds, belonging to the Nation.

7. Defendant Ross O. Swimmer is the Special Trustee for American Indians, a sub-cabinet level officer appointed by the President of the United States with the advice and consent of the Senate and reporting directly to the Secretary of the Interior. A number of Defendant Swimmer's duties are delineated in the Indian Trust Fund Management Reform Act of October 25, 1994,

Pub. L. No. 103-412, 25 U.S.C. §§ 4042, *et seq.* ("the 1994 Act").

8. Defendant Henry M. Paulson is the Secretary of the Treasury, and as such is the custodian of the tribal trust funds and is responsible for administering those funds and for preparing and maintaining certain records in connection therewith.

III. JURISDICTION AND VENUE

9. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331 and 1362, as the Nation is a federally recognized Indian tribe and its claims arise under the Constitution and laws of the United States, including, but not limited to, the numerous statutes and regulations giving rise to the trust relationship between the United States and the Nation. This Court also has jurisdiction over this action under 28 U.S.C. § 1361 and 5 U.S.C. § 706, as this is an action to compel federal officials to perform a duty owed to the Nation.

10. The United States has waived its immunity from suit under § 702 of the Administrative Procedure Act ("the APA"), 5 U.S.C. § 702. Section 702 waives sovereign immunity for all claims for relief other than money damages, including all forms of equitable relief, involving a federal official's action or failure to act. *See, e.g., Bowen v. Mass.*, 487 U.S. 879, 893-95, 108 S. Ct. 2722 (1988); *Schnapper v. Foley*, 667 F.2d 102, 107-08 (D.C. Cir. 1981) (noting that § 702 is "intended to eliminate the defense of sovereign immunity with respect to any action . . . seeking relief other than money damages and based on the assertion of unlawful action by a federal officer"). The APA's waiver of sovereign immunity applies to any such suit, regardless of whether the suit is

brought under the APA. *See, e.g., Cobell v. Norton* ("*Cobell VI*"), 240 F.3d 1081, 1095-96 (D.C. Cir. 2001); *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996).

11. Venue in this Court is proper under 28 U.S.C. § 1391(e), as the defendants are officers and employees of the United States acting in an official capacity and a substantial part of the acts or omissions giving rise to the Nation's claims occurred within this judicial district.

IV. THE TRUST OBLIGATIONS OF THE UNITED STATES AND OF THE DEFENDANTS WITH RESPECT TO TRIBAL TRUST ASSETS

12. The United States unquestionably owes substantial fiduciary obligations to the Nation with respect to the management and administration of the Nation's trust funds and other trust assets. *See Cobell VI*, 240 F.3d at 1098 (citing numerous cases).

13. Tribal lands, associated resources, and the income derived therefrom constitute a substantial portion of the assets held by the United States in trust for the Nation's benefit. Title to the land constituting the Nation's reservation is held in trust by the United States, with the Nation as the beneficial owner of the land and associated natural resources. Income is derived from, *inter alia*, the scale of these natural resources and the conveyance of certain interests in the Nation's tribal trust land, including leases, easements, and rights of way. These assets and the income they produce form the core of the Nation's tribal trust assets.

14. Additional assets held in trust by the United States for the Nation's benefit are derived from judgments entered by federal courts on various claims

brought by the Nation against the United States. This includes claims brought under the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049 (covering claims accruing before August 13, 1946). Specifically, the Nation's claims for (1) aboriginal title to, loss of subsurface rights within, and trespass upon some 6,338,113 acres of tribal land in the present-day State of Arizona and (2) a general accounting resulted in a $26 million ($26,000,000.00) judgment from the Indian Claims Commission. 38 Ind. Cl. Comm. 542, 542-43 (July 21, 1976). According to government records, of this amount, $11,698,253.28 was retained in trust by the United States for the benefit of the Nation. *See* Pub. L. No. 97-408; Letter from the Area Director, Phoenix Area Office, Bureau of Indian Affairs, U.S. Department of the Interior to Sylvester Listo and Kate Hoover, Tohono O'odham Nation (July 23, 1993). As trustee, the United States undertook to manage, invest, and distribute these judgment funds as trust assets for the benefit of the Nation.

15. Because the United States holds the Nation's tribal lands and other assets in trust, it has assumed the fiduciary obligations of a trustee. As a trustee, the United States is charged with "'moral obligations of the highest responsibility and trust' . . . and its conduct 'should therefore be judged by the most exacting fiduciary standards.'" *Cobell VI*, 240 F.3d at 1099 (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296, 62 S. Ct 1049 (1942)). Because Congress established this trust by statute, "[c]ourts 'must infer that Congress intended to impose on trustees traditional fiduciary duties unless Congress unequivocally expressed an intent to the contrary.'" *Cobell VI*, 240 F.3d at 1099 (quoting

NLRB v. Amax Coal Co., 453 U.S. 322, 330, 101 S. Ct. 2789 (1981)).

16. The longstanding trust relationship between the United States and the Nation and the United States' resulting fiduciary duties are rooted in and derived from numerous statutes and regulations. *See, e.g.*, Indian Nonintercourse Act, 25 U.S.C. § 177; Indian Long-Term Leasing Act, 25 U.S.C. § 396; Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g; Federal Oil & Gas Royalty Management Act, 30 U.S.C. §§ 1701, *et seq.*; Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101, *et seq.*; Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. §§ 4001, *et seq.*, 25 U.S.C. § 152; 25 U.S.C. §§ 157-58, 160; 25 U.S.C. §§ 155, 155b; 25 U.S.C. §§ 161a, 161b, 162 (repealed in 1938), 162a, 413; 25 U.S.C. §§ 311, 312, 318a, 319, 321, 323-28; 25 U.S.C. § 397; 25 U.S.C. §§ 398, *et seq.*; 25 U.S.C. § 399; 25 U.S.C. §§ 415-415d; 31 U.S.C. § 1321(a); 25 C.F.R. pt. 87; 25 C.F.R. pts. 150-51; 25 C.F.R. pt. 162; 25 C.F.R. pt. 166; 25 C.F.R. pt. 169; 25 C.F.R. pt. 211; 25 C.F.R. pt. 216; 25 C.F.R. pt. 225; 30 C.F.R. pt. 206; 43 C.F.R. § 3590.2(i).

17. The 1994 Act, which, among other things, created the Office of the Special Trustee for American Indians, served to recognize, reaffirm, and clarify the United States' preexisting fiduciary duties as derived from the relevant statutes and regulations, including the duty to account. *Cobell VI*, 240 F.3d at 1090, 1096. It was designed to "help rectify the government's longstanding failure" to fulfill its trust obligations. *Id.* The 1994 Act did not create the United States' fiduciary duties, nor did it "define and limit the extent of [the defendants'] obligations.[*sic*] *Id.* at 1100. Moreover, the 1994 Act

does not, and was not intended to, serve as the sole source of those duties or of the Nation's attendant rights. *Id.* at 1099.

18. The statutes, regulations, and executive orders giving rise to the United States' fiduciary duties provide the "general contours" of those duties, but the specific details are filled in through reference to general trust law and "defined in traditional equitable terms." *Id.* Accordingly, the defendants' "actions must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary." *Id.* (citations and internal quotations omitted).

19. As trustee of the Nation's tribal trust assets, the United States owes, and continuously since the inception of the tribal trust program has owed, certain traditional fiduciary duties and responsibilities to the Nation as a trust beneficiary. These duties include, but are not limited to, the duty to:

(a) Perform a complete, accurate, and adequate historical accounting of all the trust property, with such accounting containing sufficient information to enable the Nation to readily ascertain whether the trust has been and is being faithfully carried out;

(b) Maintain adequate books and records with respect to the trust property, including, but not limited to, records of leases and other contractual arrangements giving rise to income from the trust property and records of the investment of tribal trust assets;

(c) Refrain from self-dealing or otherwise benefitting from management of the trust property;

(d) Take reasonable steps to preserve and protect trust property;

(e) Take reasonable steps to bring and enforce claims held by the trust;

(f) Use reasonable skill and care to invest and deposit trust funds in such a way as to maximize the productivity of trust property within the constraints of law and prudence; and

(g) Take reasonable steps to ensure that trust property is used for its highest and best use.

V. BREACHES OF TRUST BY THE DEFENDANTS

20. The United States, acting by and through the defendants, has consistently and egregiously failed to comply with these and other fiduciary obligations and continues to do so. Its breaches of trust include, but are not limited to:

(a) Failure to provide and unconscionably delaying the performance of a complete, accurate, and adequate accounting of trust property;

(b) Failure to maintain adequate books and records with respect to the trust property, including, but not limited to, records of leases and other contractual arrangements giving rise to income from the trust property and records of the investment of tribal trust assets;

(c) Failure to refrain from self-dealing or otherwise benefitting from management of the trust property.

(d) Failure to take reasonable steps to preserve and protect trust property;

(e) Failure to take reasonable steps to bring and enforce claims held by the trust;

(f) Failure to use reasonable skill and care to invest and deposit trust funds in such a way as to maximize the productivity of trust property within the constraints of law and prudence; and

(g) Failure to ensure that trust assets are used for their highest and best use.

21. Due to these and other breaches of the fiduciary duties owed by the United States, the Nation does not know, and has no way of ascertaining, the true state of its trust assets, including funds and related accounts holding such funds; what amounts should have been credited to the Nation and deposited in these accounts; what amounts should have been paid to the Nation; how much of the Nation's property has been diverted or converted to other uses; to what extent the United States failed to maximize profits; or whether the Untied States has attained fair market value for leases and sale of trust assets.

22. The United States' breaches of its fiduciary obligations with respect to Indian trust assets have been repeatedly and routinely condemned by the United States General Accounting Office, the United States Inspector General for the Interior Department, and the United States Office of Management and Budget, among others. *See Cobell VI*, 240 F.3d at 1090-91 (citing reports criticizing the mismanagement of Indian trust assets).

23. The United States' breaches of its fiduciary obligations with respect to Indian trust assets have also been recognized and condemned by Congress. After a

series of oversight hearings, Congress issued a report entitled "Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund," H.R. Rep. No. 102-499 (1992). In this report, Congress noted "significant, habitual problems in BIA's ability to fully and accurately account for trust fund moneys, to properly discharge its fiduciary responsibilities, and to prudently manage the trust funds." *Id.* at 2. Congress further concluded that the defendants had "utterly failed to grasp the human impact of [their] financial mismanagement of the Indian trust fund." *Id.* at 5. While the Interior Department pledged reforms in response to this report, it did little to improve its mismanagement of Indian trust assets. *Cobell VI*, 240 F.3d at 1090.

24. The 1994 Act sought to remedy the United States' long-standing failure to discharge its trust obligations. It "reaffirmed and clarified preexisting [trust] duties; it did not create them." *Id.* at 1100. Nor did it alter the nature or the scope of the fiduciary duties that the defendants owe to the Nation and to other tribal trust beneficiaries. *Id.*

25. Among the duties enumerated in the 1994 Act, section 102 makes clear that the Nation and other tribal trust beneficiaries are owed an accounting for "all funds held in trust by the United States for the benefit of an Indian tribe . . . which are deposited or invested pursuant to the Act of June 24, 1938." 25 U.S.C. § 4011(a). The 1994 Act thus "reaffirms the government's preexisting fiduciary duty to perform a complete historical accounting of trust funds accounts." *Cobell VI*, 240 F.3d at 1102.

26. The 1994 Act also created the Office of Special Trustee for American Indians. 25 U.S.C. § 4042. Cong-

ress' stated purposes in creating this office were, *inter alia*, "to provide for more effective management of, and accountability for the proper discharge of, the Secretary's trust responsibilities," and to "ensure the implementation of all reforms necessary for the proper discharge of the Secretary's trust responsibilities. . . . " 25 U.S.C. § 4041.

27. The statutory responsibilities of the Special Trustee conferred under the 1994 Act include, *inter alia*:

(a) To "oversee all reform efforts . . . to ensure the establishment of policies, procedures, systems and practices to allow the [Interior] Secretary to dischrge his trust responsibilities. . . . " 25 U.S.C. § 4043(b)(1);

(b) To "monitor the reconciliation of tribal trust accounts . . . to ensure that the Bureau [of Indian Affairs] provides the account holders with a fair and accurate accounting of all trust accounts," 25 U.S.C. § 4043(b)(2)(A); and

(c) To "ensure that the Bureau establishes appropriate policies and procedures, and develops necessary systems, that will allow it . . . properly to account for and invest, as well as maximize," subject to requirements of law, "the return on the investment of all trust fund monies," and "to prepare accurate and timely reports to account holders . . . on a periodic basis regarding all collections, disbursements, investments and returns on investments related to their accounts." 25 U.S.C. § 4043(b)(2)(B).

28. Notwithstanding the remedial purpose of the foregoing legislation, the mandates of the 1994 Act—like the government's longstanding fiduciary duties—have

not been carried out, and the defendants remain in violation of their accounting and other fiduciary obligations. In addition to the breaches of trust duties recited in paragraphs 4 and 19-23 above, the defendants have failed to comply with the enumerated duties listed in the 1994 Act. Furthermore, Defendant Swimmer has failed to discharge his responsibilities as Special Trustee or to take any meaningful steps to fix a trust management system that remains broken after more than a century of defendants' malfeasance, recalcitrance, and neglect.

29. The defendants also have failed to comply with other statutory directives intended to address their ongoing breaches of preexisting trust duties. By the Act of December 22, 1987, Pub. L. No. 100-202 (101 Stat. 1329), Congress directed that the defendants (1) audit and reconcile tribal trust funds and (2) provide the tribal trust beneficiaries with an accounting of such funds. Congress reaffirmed the mandates of the 1987 Act in subsequent statutes, namely, the Act of October 23, 1989, Pub. L. No. 101-121, 103 Stat. 701; the Act of November 5, 1990, Pub. L. No. 101-512, 104 Stat. 1915, and the Act of November 3, 1991, Pub. L. No. 102-154, 105 Stat. 990. These acts, like the 1994 Act, are reaffirmations of preexisting obligations rather than sources of new obligations. Even after nearly twenty years, these statutory requirements have never been met, and the defendants remain in derogation of their trust duties.

30. The reports produced by government contractor Arthur Andersen LLP (the "AA Reports") and provided to the Nation and other tribal trust beneficiaries fall far short of satisfying the defendants' fiduciary duty to provide a complete, accurate, and adequate accounting. Even the Bureau of Indian Affairs ("BIA") within the

Interior Department has admitted that the AA Reports were not full and complete accountings. *See* Bureau of Indian Affairs' Proposed Legislative Options in Response to Tribal Trust Fund Reconciliation Project Results at 12 (Dec. 1996) ("Despite five years of effort and the expenditure of $21 million, the [AA] Project provides a less than complete accounting of the state of the Tribal trust funds."). Shortcomings of the AA Reports include, but are not limited to, the fact that the Reports:

(a) Analyzed trust fund accounts only for the limited time period of Fiscal Years 1973-1991;

(b) Were not based on or prepared in accordance with generally accepted accounting and auditing standards;

(c) Were premised on the erroneous assumption that complete, accurate, and adequate accountings could be conducted based on unverified information provided by the BIA; and

(d) Were based on accounts for which records and information were non-existent or could not be located.

See, e.g., U.S. General Accounting Office, Report to the Committee on Indian Affairs, U.S. Senate, Financial Management, BIA's Tribal Trust Fund Account Reconciliation Results, GAO/AIMD-96-63 (May 1996); U.S. General Accounting Office, Testimony before the Committee on Indian Affairs, U.S. Senate, Indian Trust Funds, Tribal Account Balances, GAO-02-420T at 2 (Feb. 7, 2002).

31. Congressional recognition of the defendants' continued and ongoing failure to satisfy their fiduciary duty to render a complete, accurate, and adequate ac-

counting is evidenced by the inclusion, in each Interior Department Appropriations Act since 1990, of a provision stating that "the statute of limitations shall not commence to run on any claim concerning losses to or mismanagement of trust funds until the affected tribe . . . has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss." *See, e.g.*, Act of November 5, 1990, Pub. L. No. 101-512, 104 Stat. 1915; Act of November 13, 1991, Pub. L. No. 102-154, 105 Stat. 990; Act of October 5, 1992, Pub. L. No. 102-381, 106 Stat. 1374; Act of November 11, 1993, Pub. L. No. 103-138, 107 Stat. 1379; Act of September 30, 1994, Pub. L. No. 103-332, 108 Stat. 2499; Act of April 26, 1996, Pub. L. No. 104-134, 110 Stat. 1321; Act of September 30, 1996, Pub. L. No. 104-208, 110 Stat. 3009; Act of November 14, 1997, Pub. L. No. 105-83, 111 Stat. 1543; Act of October 21, 1998, Pub. L. No. 105-277, 112 Stat. 2681; Act of November 29, 1999, Pub. L. No. 106-114, 113 Stat. 1501; Act of October 11, 2000, Pub. L. No. 106-291, 114 Stat. 922; Act of November 5, 2001, Pub. L. No. 107-63.

COUNT ONE

32. The Nation restates and incorporates herein the allegations of paragraphs 1 through 31 above.

33. The United States, acting through the defendants, owes to the Nation fiduciary duties of the highest responsibility and trust with respect to property that it holds in trust for the Nation's benefit. These statutorily-derived duties, which may be either express or implied in law, are akin to those stated under the common law of trusts.

34. Among the duties that defendants owe is the duty to provide the Nation with a complete, accurate, and

adequate accounting of all property held in trust by the Untied States for the Nation's benefit. The accounting obligation that the defendants owe to the Nation requires, *inter alia*, an accounting report that "contain[s] sufficient information for the [Nation] readily to ascertain whether the trust has been faithfully carried out." *Cobell VI*, 240 F.3d at 1103 (internal quotation omitted).

35. The defendants have, from the inception of the trust to the present, failed to fulfill these fiduciary obligations, and this failure constitutes a breach of the defendants' fiduciary duties to the Nation and a violation of federal law.

36. Specifically, the defendants have, *inter alia*, failed to provide the Nation with a complete, accurate, and adequate accounting of the Nation's trust assets, and this failure constitutes a breach of the defendants' fiduciary duties to the Nation and a violation of federal law.

37. The Nation is entitled to a declaration that the AA Report prepared by the defendants' contractors does not constitute the complete, accurate, and adequate accounting required by federal law.

38. The Nation is entitled to a further declaration that the defendants have breached the fiduciary duties they owe to the Nation by, *inter alia*, failing to provide the Nation with a complete, accurate, and adequate accounting of the Nation's trust assets as required by law.

39. The Nation is entitled to a further declaration (1) delineating the defendants' fiduciary duties to, among other things, enable proper discharge of their accounting obligation and (2) finding that the defendants have breached their duties so declared.

COUNT TWO

40. The Nation restates and incorporates herein the allegations of paragraphs 1 through 39 above.

41. There is no indication that the defendants will, of their own accord, depart from their longstanding and continuing pattern of failure to comply with their fiduciary duties to the Nation.

42. The Nation is entitled to injunctive relief directing the defendants to provide a complete, accurate, and adequate accounting of the Nation's trust assets, including, but not limited to, funds under the custody and control of the United States, and to comply with all other fiduciary duties as determined by this Court.

43. The Nation is further entitled to make exceptions and objections to the accounting provided, to a restatement of their trust fund account balances in conformity with the ultimate and complete accounting, and to any additional equitable relief that may be appropriate (e.g., disgorgement, equitable restitution, or an injunction directing the trustee to take action against third parties).

44. The Nation is entitled to further injunctive relief directing the defendants to bring themselves into conformity with their fiduciary obligations and otherwise address breaches of trust found by the Court.

WHEREFORE, THESE PREMISES CONSIDERED, THE PLAINTIFF PRAYS:

1. For a decree construing the trust obligations of the defendants to the Nation, including, but not limited to, the duty to provide a complete, accurate, and ade-

quate accounting of all trust assets belonging to the Nation and held in trust by the defendants.

2. For a decree that the United States, acting through the defendants, has been in breach of its trust obligations since the inception of this trust and continues to be in breach of those duties today, specifically including, *inter alia*, its fiduciary duty to provide a complete, accurate, and adequate accounting of all trust assets belonging to the Nation and held in trust by the United States.

3. For a decree that the AA Reports do not constitute the complete, accurate, and adequate accounting that the defendants are obligated to provide to the Nation.

4. For a decree delineating the fiduciary duties owed by the defendants to the Nation with respect to the management and administration of the trust assets belonging to the Nation.

5. For a decree directing the defendants (1) to provide a complete, accurate, and adequate accounting of the Nation's trust assets, including, but not limited to, funds under the custody and control of the United States and (2) to comply with all other fiduciary duties as determined by this Court.

6. For a decree providing for the restatement of the Nation's trust fund account balances in conformity with this accounting, as well as any additional equitable relief that may be appropriate (e.g., disgorgement, equitable restitution, or an injunction directing the trustee to take action against third parties).

7. For a decree requiring the defendants to provide to the Nation all material information regarding the

management and administration of the trust assets belonging to the Nation and held in trust for its benefit by the defendants.

8. For an award of the Nation's costs of suit, including, without limitation, attorneys' fees under the Equal Access to Justice Act and other statutes as well as general equitable principles, and the fees and costs of expert assistance.

9. For such other and further relief as the Court, as a Chancellor sitting in equity, may deem just and proper.

December 28, 2006

Respectfully submitted,

KEITH HARPER
KEITH HARPER
D.C. Bar No. 451956
G. William Austin
D.C. Bar No. 478417
Kilpatrick Stockton LLP
607 14th Street, N.W.
Suite 900
Washington, D.C. 20005
(202) 508-5800

Attorneys for Plaintiff
Tohono O'odham Nation

APPENDIX F

The following pairs of pending lawsuits have been filed by Indian Tribes against the United States in both the Court of Federal Claims and in federal district court:

(1) *Ak-Chin Indian Cmty.* v. *United States*, No. 1:06-cv-932 (Fed. Cl. filed Dec. 29, 2006), and

Ak-Chin Indian Cmty. v. *Salazar*, No. 1:06-cv-2245 (D.D.C. filed Dec. 29, 2006).

(2) *Cheyenne River Sioux Tribe* v. *United States*, No. 1:06-cv-915 (Fed. Cl. filed Dec. 28, 2006), and

Cheyenne River Sioux Tribe v. *Salazar*, No. 1:06-cv-1897 (D.D.C. filed Nov. 7, 2006).

(3) *Coeur d'Alene Tribe* v. *United States*, No. 1:06-cv-940 (Fed. Cl. filed Dec. 29, 2006), and

Coeur d'Alene Tribe v. *Salazar*, No. 1:06-cv-2242 (D.D.C. filed Dec. 29, 2006).

(4) *Colorado River Indian Tribes* v. *United States*, No. 1:06-cv-901 (Fed. Cl. filed Dec. 27, 2006), and

Colorado River Indian Tribes v. *Salazar*, No. 1:06-cv-2212 (D.D.C. filed Dec. 27, 2006).

(5) *Confederated Tribes* v. *United States*, No. 1:06-cv-912 (Fed. Cl. filed Dec. 28, 2006), and

Confederated Tribes v. *Salazar*, No. 1:06-cv-1902 (D.D.C. filed Nov. 7, 2006).

(6) *Crow Creek Sioux Tribe* v. *United States*, No. 1:05-cv-1383 (Fed. Cl. filed Dec. 29, 2005), and

Crow Creek Sioux Tribe v. *Salazar*, No. 1:04-cv-900 (D.D.C. filed June 2, 2004).

(7) *Eastern Shawnee Tribe* v. *United States*, No. 1:06-cv-917 (Fed. Cl. filed Dec. 28, 2006), and

Eastern Shawnee Tribe v. *Salazar*, No. 1:06-cv-2162 (D.D.C. filed Dec. 20, 2006).

(8) *Haudenosaunee* v. *United States*, No. 1:06-cv-909 (Fed. Cl. filed Dec. 28, 2006), and

Haudenosaunee v. *Salazar*, No. 1:06-cv-2254 (D.D.C. filed Dec. 29, 2006).

(9) *Iowa Tribe* v. *United States*, No. 1:06-cv-920 (Fed. Cl. filed Dec. 28, 2006), and

Iowa Tribe v. *Salazar*, No. 1:06-cv-1899 (D.D.C. filed Nov. 7, 2006).

(10) *Kaw Nation* v. *United States*, No. 1:06-cv-934 (Fed. Cl. filed Dec. 29, 2006), and

Kaw Nation v. *Salazar*, No. 5:06-cv-1437 (W.D. Okla. filed Dec. 29, 2006).

(11) *Lower Brule Sioux Tribe* v. *United States*, No. 1:06-cv-922 (Fed. Cl. filed Dec. 28, 2006), and

Lower Brule Sioux Tribe v. *Salazar*, No. 1:05-cv-2495 (D.D.C. filed Dec. 30, 2005).

(12) *Muscogee (Creek) Nation* v. *United States*, No. 1:06-cv-918 (Fed. Cl. filed Dec. 28, 2006), and

Muscogee (Creek) Nation v. *Salazar*, No. 1:06-cv-2161 (D.D.C. filed Dec. 20, 2006).

(13) *Nez Perce Tribe* v. *United States*, No. 1:06-cv-910 (Fed. Cl. filed Dec. 28, 2006), and

Nez Perce Tribe v. *Salazar*, No. 1:06-cv-2239 (D.D.C. filed Dec. 28, 2006).

(14) *Northwestern Band of Shoshone* v. *United States*, No. 1:06-cv-914 (Fed. Cl. filed Dec. 28, 2006), and

Northwestern Band of Shoshone v. *Salazar*, No. 1:06-cv-2163 (D.D.C. filed Dec. 20, 2006).

(15) *Ogala Sioux Tribe* v. *United States*, No. 1:05-cv-1378 (Fed. Cl. filed Dec. 28, 2005), and

Ogala Sioux Tribe v. *Salazar*, No. 1:04-cv-1126 (D.D.C. filed June 30, 2004).

(16) *Omaha Tribe* v. *United States*, No. 1:06-cv-911 (Fed. Cl. filed Dec. 28, 2006), and

Omaha Tribe v. *Salazar*, No. 1:04-cv-901 (D.D.C. filed June 2, 2004).

(17) *Osage Tribe of Indians* v. *United States*, No. 1:99-cv-550 (Fed. Cl. filed Aug. 2, 1999), and

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(18) *Otoe-Missouria Tribe of Indians* v. *United States*, No. 1:06-cv-937 (Fed. Cl. filed Dec. 29, 2006), and

Otoe-Missouria Tribe v. *Salazar*, No. 5:06-cv-1436 (W.D. Okla. filed Dec. 29, 2006).

(19) *Passamaquoddy Tribe* v. *United States*, No. 1:06-cv-942 (Fed. Cl. filed Dec. 29, 2006), and

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(20) *Prairie Band of Potawatomi Indians* v. *United States*, No. 1:06-cv-921 (Fed. Cl. filed Dec. 28, 2006), and

Prairie Band of Potawatomi Nation v. *Salazar*, No. 1:05-cv-2496 (D.D.C. filed Dec. 30, 2005).

(21) *Red Cliff Band of Lake Superior Chippewa Indians* v. *United States*, No. 1:06-cv-923 (Fed. Cl. filed Dec. 28, 2006), and

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(22) *Rosebud Sioux Tribe* v. *United States*, No. 1:06-cv-924 (Fed. Cl. filed Dec. 28, 2006), and

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(23) *Salt River Pima-Maricopa Indian Cmty.* v. *United States*, No. 1:06-cv-943 (Fed. Cl. filed Dec. 29, 2006), and

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(24) *Seminole Nation* v. *United States*, No. 1:06-cv-935 (Fed. Cl. filed Dec. 29, 2006), and

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(25) *Sokaogon Chippewa Cmty.* v. *United States*, No. 1:06-cv-930 (Fed. Cl. filed Dec. 29, 2006), and

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(26) *Stillaguamish Tribe of Indians* v. *United States*, No. 1:06-cv-916 (Fed. Cl. filed Dec. 28, 2006), and

Stillaguamish Tribe of Indians v. *Salazar*, No. 1:06-cv-1898 (D.D.C. filed Nov. 7, 2006).

(27) *Tonkawa Tribe of Indians* v. *United States*, No. 1:06-cv-938 (Fed. Cl. filed Dec. 29, 2006), and

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(28) *United Keetoowah Band of Cherokee Indians* v. *United States*, No. 1:06-cv-936 (Fed. Cl. filed Dec. 29, 2006), and

United Keetoowah Band of Cherokee Indians v. *United States*, No. 1:08-cv-1087 (D.D.C. transferred June 24, 2008) (formerly No. 6:06-cv-559 (E.D. Okla. filed Dec. 29, 2006)).

(29) *Winnebago Tribe* v. *United States*, No. 1:06-cv-913 (Fed. Cl. filed Dec. 28, 2006), and

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(30) *Wyandot Nation* v. *United States*, No. 1:06-cv-919 (Fed. Cl. filed Dec. 28, 2006), and

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(31) *Yankton Sioux Tribe* v. *United States*, No. 1:05-cv-1291 (Fed. Cl. filed Dec. 14, 2005), and

Yankton Sioux Tribe v. *Salazar*, No. 1:03-cv-1603 (D.D.C. filed July 28, 2003).

APPENDIX G

1. Section 8 of the Act of June 25, 1868, ch. 71, 15 Stat. 77,[1] provided:

And be it further enacted, That no person shall file or prosecute any claim or suit in the court of claims, or an appeal therefrom, for or in respect to which he or any assignee of his shall have commenced and has pending any suit or process in any other court against any officer or person who, at the time of the cause of action alleged in such suit or process arose, was in respect thereto acting or professing to act, mediately or immediately, under the authority of the United States, unless such suit or process, if now pending in such other court, shall be withdrawn or dismissed within thirty days after the passage of this act.

2. Section 1067 of the Revised Statutes (1875 and 1878)[2] and Section 154 of the Judicial Code of 1911, ch. 231, 36 Stat. 1138 (28 U.S.C. 260 (1946)),[3] provided:

No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States.

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[1] Repealed 1874. See Rev. Stat. § 5596 (1875) (enacted 1874).

[2] Repealed 1911. See Judicial Code, ch. 231, § 297, 36 Stat. 1168.

[3] Repealed 1948. See Act of June 25, 1948, ch. 646, § 39, 62 Stat. 996.

3. 28 U.S.C. 1500 (Supp. II 1948) provided:

The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

4. 28 U.S.C. 1500 provides:

The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

OPPOSITION BRIEF

No. 09-846

Supreme Court, U.S.
FILED
MAR 18 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

TOHONO O'ODHAM NATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION

RAYMOND M. BENNETT
KILPATRICK STOCKTON LLP
3737 Glenwood Avenue
Suite 400
Raleigh, NC 27612
919-420-1700

KEITH M. HARPER
Counsel of Record
G. WILLIAM AUSTIN
CATHERINE F. MUNSON
KILPATRICK STOCKTON LLP
607 14th Street, N.W.
9th Floor
Washington, D.C. 20005
kharper@kilpatrickstockton.com
202-824-1448

ADAM H. CHARNES
KILPATRICK STOCKTON LLP
1001 West Fourth Street
Winston-Salem, NC 27101
336-607-7300

Counsel for Respondent

QUESTIONS PRESENTED

I. Whether 28 U.S.C. § 1500, which is intended to prevent duplicative lawsuits against the United States, deprives the Court of Federal Claims (CFC) of jurisdiction over a claim that seeks relief different from that requested in a suit pending in another court, even if such an interpretation would compel a litigant to pursue one form of relief and to abandon another form.

II. Whether for purposes of 28 U.S.C. § 1500, the Tohono O'odham Nation's complaint in the district court asserting a claim for an equitable accounting and restatement of its trust accounts seeks the same relief as requested in the Nation's complaint in the CFC seeking money damages for the government's failure to maximize the return on those trust assets.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	v
INTRODUCTION	1
COUNTERSTATEMENT	3
A. The Statute.	3
B. The Complaints.	7
1. District Court Complaint.	7
2. CFC Complaint.	9
C. Proceedings Below.	10
REASONS FOR DENYING THE PETITION	15
I. REVIEW IS NOT WARRANTED TO RECONSIDER THE WELL-SETTLED RULE THAT SECTION 1500 DOES NOT BAR SUITS THAT SEEK DIFFERENT RELIEF.	15
A. The Same Relief Requirement Is Settled Precedent That Does Not Warrant This Court's Review.	15

Contents

Page

B. The *Casman* Rule Is Consistent With The Text And Purposes Of Section 1500. 18

C. Even If The Court Were Inclined To Review The Same Relief Requirement, This Case Is A Poor Vehicle For Doing So. 22

II. REVIEW IS NOT WARRANTED TO CONSIDER WHETHER THE FEDERAL CIRCUIT CORRECTLY APPLIED A SETTLED RULE TO THE PARTICULAR COMPLAINTS IN THIS CASE. 23

III. REVIEW IS NOT WARRANTED TO ADDRESS POLICY CONSIDERATIONS AND *DICTA* IN THE FEDERAL CIRCUIT'S DECISION. 28

A. The Time Of Filing Rule Is Not Presented Here. 29

B. The Government Is Incorrect That The Federal Circuit Invoked Policy Considerations To Expand The Jurisdiction of the CFC. 30

Contents

Page

IV. THE GOVERNMENT'S CLAIMS OF ADVERSE CONSEQUENCES ARE EXAGGERATED AND DO NOT WARRANT THIS COURT'S REVIEW. 32

CONCLUSION 34

TABLE OF CITED AUTHORITIES

Page

Cases:

55 Motor Ave. Co. v. United States,
194 F.3d 1332 (Fed. Cir. 1999) 6

Adams v. Robertson,
520 U.S. 83 (1997) 22

Agustin v. United States,
92 Fed. App'x 786 (Fed. Cir. 2004) 6

Allied Materials & Equip. v. United States,
210 Ct. Cl. 714 (1976) 5, 16, 19

Boston Five Cents Sav. Bank, FSB v. United States,
864 F.2d 137 (Fed. Cir. 1988) 5, 16, 20

Bowen v. City of New York,
476 U.S. 467 (1986) 32

British Am. Tobacco Co. v. United States,
89 Ct. Cl. 438 (1939) 4, 6, 17

Casman v. United States,
135 Ct. Cl. 647 (1956) ..... *passim*

Coffman v. Breeze Corps.,
323 U.S. 316 (1945) 29

Cited Authorities

Page

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77 Fed. Cl. 173 (2007) 6, 24

Corona Coal Co. v. United States,
263 U.S. 537 (1924) 4

d'Abrera v. United States,
78 Fed. Cl. 51 (2007) 6, 10

Dico v. United States,
48 F.3d 1199 (Fed. Cir. 1995) 6, 24

Franconia Assocs. v. United States,
536 U.S. 129 (2002) 32

Griffin v. United States,
85 Fed. Cl. 179 (2008) 31, 32

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378 F.3d 1324 (Fed. Cir. 2004) 6

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72 F.3d 883 (Fed. Cir. 1995) 29-30

John R. Sand & Gravel Co. v. United States,
552 U.S. 130 (2008) 16

Johns-Manville Corp. v. United States,
855 F.2d 1556 (Fed. Cir. 1988) 19, 31

Cited Authorities

Page

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508 U.S. 200 (1993) ..... *passim*

Klamath & Modoc Tribes v. United States,
174 Ct. Cl. 483 (1966) 8, 28

Lane v. Pena,
518 U.S. 187 (1996) 31

Lorillard v. Pons,
434 U.S. 575 (1978) 17

Loveladies Harbor, Inc. v. United States,
27 F.3d 1545 (Fed. Cir. 1994) ..... *passim*

OSI, Inc. v. United States,
73 Fed. Cl. 39 (2006) 6, 25

Penn. Dep't of Corr. v. Yeskey,
524 U.S. 206 (1998) 22

Richlin Sec. Serv. Co. v. Chertoff,
128 S. Ct. 2007 (2008) 31

Richmond, Fredericksburg Potomac R.R. Co. v. United States,
75 F.3d 648 (Fed. Cir. 1996) 6

Shepard v. United States,
544 U.S. 13 (2005) 16

Cited Authorities

Page

Ex parte Skinner & Eddy Corp.,
265 U.S. 86 (1924) 4

Tecon Eng'rs, Inc. v. United States,
343 F.2d 943 (Ct. Cl. 1965) 2, 29, 30

Truckee-Carson Irrigation Dist. v. United States,
223 Ct. Cl. 684 (1980) 5, 16, 20

UNR Indus., Inc. v. United States,
920 F.2d 916 (Fed. Cir. 1990) 21

UNR Indus., Inc. v. United States,
962 F.2d 1013 (Fed. Cir. 1992) 3, 5, 29

United States v. County of Cook, Ill.,
170 F.3d 1084 (Fed. Cir. 1999) 6

Statutes:

5 U.S.C. § 702 (2006) 13, 27

28 U.S.C. § 1500 (2006) ..... *passim*

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Captured and Abandoned Property Act of 1863, ch. 120, 12 Stat. 820 3

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Page

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Federal Courts Improvement Act of 1982, § 133(e)(1), 96 Stat. 40 17

Indian Tucker Act, 28 U.S.C. § 1505 (2006) 31

Tucker Act, 28 U.S.C. § 1491(a)(1) (2006) 31

Rules:

Sup. Ct. R. 10 ..... 1, 23

Other Authorities:

G. Bogert *et al.*, *The Law of Trusts and Trustees* § 963 (2d ed. 1983) 27

Manual for Complex Litigation (Fourth) § 20.14 (2004) 33

INTRODUCTION

The government fails to establish any "compelling" reason that satisfies this Court's exacting requirements for certiorari. Sup. Ct. R. 10. The principal issue the government raises in its petition challenges a rule settled since 1956. *Casman v. United States*, 135 Ct. Cl. 647 (1956), held that 28 U.S.C. § 1500 does not bar the filing of a suit in the Court of Federal Claims ("CFC") when it seeks relief different from that requested in a suit pending in another court. This Court declined to repudiate that rule or even cast doubt on it in *Keene Corp. v. United States*, 508 U.S. 200 (1993), and the Federal Circuit (the only court of appeals charged with interpreting the statute) reaffirmed the rule in a considered en banc decision in *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545 (Fed. Cir. 1994). Although this Court has not itself passed on *Casman* and *Loveladies*, it has noted the particular importance of settled law in the interpretation of § 1500. *See Keene*, 508 U.S. at 210-14. And in the more than half a century *Casman* has been the law, Congress has not taken any action to overturn it, but instead has adopted the rule through reenactment. Lower courts have applied the rule without mishap, indeed without the "significant adverse consequences" (Pet. 30) claimed by the government. Further, parties, including respondent Tohono O'odham Nation (the "Nation"), have acted in reliance upon the settled rule. Therefore, review is not warranted to entertain the government's argument that a statute intended only to prevent "duplicative lawsuits" against the United States, *Keene*, 508 U.S. at 216, should instead be applied to compel litigants to pursue only one form of relief and to abandon another form, even if completely different.

Nor is this Court's review warranted to consider whether the Federal Circuit properly applied the settled *Casman/Loveladies* rule to the specific facts presented in this case. Consistent with this settled rule, the Federal Circuit held that § 1500 does not bar the Nation's complaint in the CFC for money damages for failure to maximize the return on its trust assets because it does not seek the same relief as its complaint pending in the district court for an equitable accounting and restatement of its accounts. The only issue on which the majority and dissent below disagreed was the fact-specific question of how to interpret the two complaints; there was no disagreement on the law. Further, there was no dissent from the decision to deny the government's petition for rehearing en banc. This Court's review is not warranted to consider whether the Federal Circuit properly applied a settled rule of law on which the only disagreement in the court below involved the facts.

The other concerns the government raises are misplaced. Whether the Court should overturn the long-settled, and recently reaffirmed, precedent in *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 976 (1966), holding that a later-filed action in the district court does not deprive the CFC of jurisdiction under § 1500, is simply not presented in this case. And the decision below will not result in significant waste of judicial resources or inconsistent decisions. To the extent there is a risk of duplicated effort (and there is no reason to believe there would be), that risk may be eliminated through the use of case management techniques commonly employed in the litigation of related, complex cases and the application of traditional principles of comity, collateral estoppel, and res judicata.

COUNTERSTATEMENT

A. The Statute.

The history of § 1500 is straightforward and important to an understanding of the issues raised in the petition. During the Civil War, Congress passed the Captured and Abandoned Property Act of 1863, ch. 120, 12 Stat. 820, which allowed property in the Confederate states to be seized and used by the government to further the war effort. *UNR Indus., Inc. v. United States*, 962 F.2d 1013, 1017 (Fed. Cir. 1992) (en banc), *aff'd sub nom. Keene*, *supra*. Claimants to the confiscated property (usually cotton) could recover any proceeds from its sale by filing a claim in the Court of Claims (the forerunner to the CFC), provided they could establish they had not "aided or provided comfort" to participants in the rebellion. *Id.*

When these so-called "cotton claimants" had difficulty meeting the statutory condition that they had not given comfort to the Confederacy, they resorted to separate suits in state and federal district courts on tort theories (like conversion) directly against the federal officials. *Keene*, 508 U.S. at 206. Although the claimants invoked different legal theories in each court (a statutory claim in the Court of Claims and a tort claim in the district court), in both courts the claimants sought to recover the same money for the same wrongful conduct. It was these "duplicative lawsuits" that induced Congress to enact the predecessor to § 1500 in 1868. *Id.*; *see* Act of June 25, 1868, ch. 71, § 8, 15 Stat. 77.[1]

1. The subsequent statutory history is explained in *UNR*, 962 F.2d at 1017-19.

Section 1500 provides, in relevant part, that "[t]he United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States." 28 U.S.C. § 1500. Although the statute requires a comparison of the "claims" filed in each court, the "exact nature of the things to be compared is not illuminated . . . by the awkward formulation of § 1500." *Keene*, 508 U.S. at 210. Consequently, this Court and others have turned to "earlier readings of the word 'claim' as it appears in this statute" to determine the meaning of the term. *Id.*

Courts have long defined "claim" in terms of the operative facts involved and the relief sought. *See Keene*, 508 U.S. at 212 (Section 1500 requires dismissal of the CFC action when "the plaintiff's other suit [is] based on substantially the same operative facts as the Court of Claims action, at least if there was some overlap in the relief requested.") (citing *Corona Coal Co. v. United States*, 263 U.S. 537 (1924); *Ex parte Skinner & Eddy Corp.*, 265 U.S. 86 (1924)). With respect to the operative facts, the test does not depend on the legal theories underlying the claims. The Court of Claims' decision in *British American Tobacco Co. v. United States*, 89 Ct. Cl. 438 (1939), *cert. denied*, 310 U.S. 627 (1940), rejected the argument that an action should avoid dismissal under § 1500 where "[t]he only distinction between the two suits" was "that the action in the District Court was made to sound in tort and the action in this court was alleged on contract." *Keene*, 508 U.S. at 212 (quoting *British Am. Tobacco*, 89 Ct. Cl. at 440). Because this interpretation of § 1500's immediate predecessor represented "settled law" when Congress reenacted the

"claim for or in respect to which" language in 1948, this Court held that the presumption applies that "Congress was aware of the earlier judicial interpretations and, in effect, adopted them." *Keene*, 508 U.S. at 212.

With respect to relief, the Court of Claims first held in 1956 that § 1500's bar on duplicative lawsuits does not extend to claims for different relief. *See Casman*, 135 Ct. Cl. 647. In *Casman*, a government employee sued for reinstatement to his position with the government in district court, and while that suit was pending, filed suit in the Court of Claims for back pay. At the time, the claim for back pay fell exclusively within the jurisdiction of the Court of Claims, but that court did not have jurisdiction to restore the plaintiff to his position. *Id.* at 649-50. The court denied the government's motion to dismiss under § 1500. Although the two suits involved the same wrongful conduct, the court held the claims were distinguished by the different form of relief each sought. *Id.* at 650.

Since *Casman*, the Court of Claims (and later the Federal Circuit) have consistently applied this principle. *See, e.g., Boston Five Cents Sav. Bank, FSB v. United States*, 864 F.2d 137 (Fed. Cir. 1988); *Truckee-Carson Irrigation Dist. v. United States*, 223 Ct. Cl. 684 (1980); *Allied Materials & Equip. v. United States*, 210 Ct. Cl. 714 (1976). In *UNR*, the Federal Circuit chose "to revisit the jurisprudence" regarding § 1500 and, in so doing, declared "overruled" a number of cases raising issues that were not presented in *UNR*, including *Casman*. *UNR*, 962 F.2d at 1021, 1022 n.3. This Court rejected that approach in *Keene*: Because the issue was not presented on the facts of the case, the Court concluded

it did not need "to consider, much less repudiate," the rule in *Casman* that two actions based on the "same operative facts, but seeking completely different relief," do not implicate § 1500. *See Keene*, 508 U.S. at 212 n.6, 216.

One year later, the Federal Circuit sitting en banc in *Loveladies* analyzed, in light of this Court's decision in *Keene*, the cases interpreting § 1500 and concluded that "we have consistently tested claims against both the principle established in *Casman* and that established in *British American*." 27 F.3d at 1551. Thus,

> [t]aken together, these tests produce a working definition of "claims" for the purpose of applying § 1500. For the Court of Federal Claims to be precluded from hearing a claim under § 1500, the claim pending in another court must arise from *the same operative facts*, and must seek *the same relief*.

Id. (emphases in original). If either requirement is missing, § 1500 does not apply. *Id.* at 1551-52. The Federal Circuit and the CFC have consistently applied this rule since 1994[2] and this was the well-settled rule at the time the Nation filed its two complaints.

2. *See, e.g.*, *Harbuck v. United States*, 378 F.3d 1324 (Fed. Cir. 2004); *Agustin v. United States*, 92 Fed. App'x 786 (Fed. Cir. 2004); *United States v. County of Cook, Ill.*, 170 F.3d 1084 (Fed. Cir. 1999); *55 Motor Ave. Co. v. United States*, 194 F.3d 1332 (Fed. Cir. 1999); *Richmond, Fredericksburg Potomac R.R. Co. v. United States*, 75 F.3d 648 (Fed. Cir. 1996); *Dico v. United States*, 48 F.3d 1199 (Fed. Cir. 1995); *d'Abrera v. United States*, 78 Fed. Cl. 54 (2007); *Cooke v. United States*, 77 Fed. Cl. 173 (2007); *OSI, Inc. v. United States*, 73 Fed. Cl. 39 (2006).

B. The Complaints.

The Tohono O'odham Nation is a federally recognized Indian tribe located in southwestern Arizona. Nearly three million acres of its non-contiguous tribal land comprise the second largest Indian reservation in the United States. These lands produce copper, other minerals, sand, and gravel and are leased to third parties and the government for rights-of-way, business uses, and other purposes. The United States acts as trustee both for these tribal lands and mineral rights as well as for substantial monies and other assets belonging to the Nation and held in trust.

On December 28 and 29, 2006, the Nation filed two different complaints against the government for breach of its trust duties – the first in the District Court for the District of Columbia and another in the CFC. Each complaint sought to remedy different wrongful acts by the government (involving different operative facts) and sought different relief. The Nation filed two actions because, in light of jurisdictional limitations on the district court and the CFC, both actions were necessary to provide the Nation with full and complete relief for all of the government's wrongful conduct.

1. District Court Complaint.

In the district court, the Nation alleged the government had failed ever to provide a complete and accurate accounting of *all* property held in trust by the United States and demanded the equitable remedy of an accounting of all of its trust assets. App. 74a-75a. The duty to provide an accounting, one of the most basic

duties a trustee owes a beneficiary, requires a full disclosure and description of each item of property constituting the corpus of the trust. The relief is only available in the district court. *See Klamath & Modoc Tribes v. United States*, 174 Ct. Cl. 483 (1966). The District Court Complaint cited decades of inaction on the part of the United States in disregard of its fundamental duty to account and the government's failure to maintain adequate records to permit the Nation to ascertain the true state of its trust assets. App. 84a-87a.

In Count One of the District Court Complaint, the Nation requested declarations that (1) the government owes a fiduciary duty to provide a complete and accurate accounting of all funds and assets, and (2) defendants are in violation of that duty. App. 89a-90a. In Count Two, the Nation requested injunctive relief directing defendants to provide such an accounting and to comply with their other fiduciary duties as determined by that court. *Id.* at 91a. To the extent the accounting uncovered errors in the account balances, the Nation requested "restatement of the Nation's trust fund account balances" to move funds in the trust from the incorrect to the correct accounts, as well as "any additional equitable relief that may be appropriate." *Id.* at 74a, 91a.

Even if the Nation prevails in the district court and obtains a correct restatement of its accounts, this will not compensate the Nation for the government's failure prudently to manage and invest the trust assets for more than 100 years. Redressing that wrongful conduct requires the proof of different operative facts and leads to a distinct remedy: damages. Accordingly, the Nation filed a separate suit in the CFC.

2. CFC Complaint.

In the CFC, the Nation sought money damages for losses it suffered as the result of the United States' breach of its fiduciary duties to maximize trust income by prudent investment and to obtain fair and reasonable compensation for the use of the Nation's non-monetary assets. App. 58a. The Nation sought only money damages for returns that should have been, but never were, earned due to the government's failure of prudent management and investment. *Id.* at 72a-73a. It did not request an accounting of any kind or other equitable relief. *See id.*

The CFC Complaint alleged four separate claims for damages arising from the government's failure prudently to manage and invest the Nation's trust assets. Count I alleged mismanagement of the mineral rights on the land the United States holds in trust for the Nation, including approving leases and issuing permits for interests in mineral rights for less than fair market value and failing to collect fair and reasonable compensation for the benefit of the Nation. App. 67a-68a. Count II alleged similar mismanagement of the Nation's non-mineral interests in its trust land, including easements, rights-of-way, and land and building leases. *Id.* at 69a-70a. Count III alleged failure to maximize trust income through mismanagement and failure prudently to invest the principal and earnings of judgment funds (*i.e.*, funds appropriated to satisfy court judgments). *Id.* at 70a-71a. Finally, Count IV alleged failure to maximize trust income through mismanagement and failure prudently to invest the principal and earnings of other funds held in trust for the Nation. *Id.* at 71a-72a.

C. Proceedings Below.

1. The government moved in the CFC to dismiss the Complaint for lack of subject-matter jurisdiction pursuant to 28 U.S.C. § 1500. The Nation raised two arguments in opposition to the government's motion. First, it argued that the operative facts – those that described the wrongful conduct giving rise to the claim as opposed to the "background facts" that provided the context for the claim – were different in each case. *See Loveladies*, 27 F.3d at 1550 (operative facts were the same where "the two suits involved the same conflict between the same parties"); *d'Abrera*, 78 Fed. Cl. at 58 (claims arising from different "conduct" were not the "same claim"). In the district court, where the Nation sought to compel the government to provide a complete accounting, the operative facts related to the government's failure ever to fulfill this fundamental obligation. Although the District Court Complaint referred to other background facts, they were not operative facts with respect to the accounting claim. In the CFC, by contrast, the Nation brought claims based on different operative facts – the failure of the United States to maximize trust income by prudent investment and to obtain fair and reasonable compensation for the use of the Nation's land and other assets. The Nation argued where, as here, two suits involve different operative facts and different wrongful conduct, § 1500 does not bar CFC jurisdiction.

Second, the Nation argued that § 1500 did not apply because it sought different relief in each court. In the district court, the Nation sought the equitable remedies available only in that court for the government's failure

to account: an order directing the government to provide the required accounting and other appropriate equitable relief including restatement of the Nation's accounts to correct the balances in accordance with the accounting. In the CFC, by contrast, the Nation did not request an accounting but sought only money damages to compensate it for money that should have been, but was never, earned as a result of the government's imprudent management and investment.

2. The CFC rejected the Nation's arguments and granted the government's motion to dismiss. Rather than examining the operative facts alleged in each complaint, the trial court inquired: "[a]s a practical matter, will the same background facts be relevant?" App. 49a. Accordingly, it compared, not the operative facts, but all of the factual allegations in the two complaints. *See id.* at 33a-37a. On the basis of its assessment of background facts, the court concluded that "there can be no meaningful dispute" that "the operative facts asserted in the complaint are, for all practical purposes, identical," and that there is "virtually 100% overlap" in the facts. *Id.* at 48a-49a.

With respect to relief, the CFC concluded there was "overlap" between the requests for relief because it believed the Nation sought a "full accounting" and "money" in both courts. App. 41a, 49a. As to the accounting, the court acknowledged that under "none of its broader jurisdictional grants does [the CFC] have general equitable powers" and that the court cannot order a pre-liability equitable accounting as "stand-alone relief." *Id.* at 40a. Nonetheless, the court concluded that an "accounting" would be "unavoidable" in the CFC

because an "accounting in aid of judgment," a procedural tool at the court's disposal to help to determine damages, would surely be necessary (even if the Nation never actually requested it). *Id.* at 40a, 55a.

As to monetary relief, the trial court concluded there were overlapping requests for money in both courts. Because the court interpreted the Nation's request in the district court for other appropriate equitable relief to include the same money damages the Nation sought in the CFC (App. 53a & n.14), the court concluded there was "virtually 100 percent overlap" between the relief sought in the two complaints. *Id.* at 49a.

3. The Federal Circuit reversed, holding that § 1500 does not apply because the two complaints do not seek the same relief.[3]

The Court of Appeals emphasized "it is the relief the plaintiff *requests* that is relevant under § 1500." App. 15a (citing *Keene*, 508 U.S. at 212). Examining the prayers for relief in each complaint, the Court of Appeals distinguished between the Nation's claims in the district court for equitable relief in the form of an equitable accounting, restatement of accounts, and other appropriate equitable relief in connection with the

3. Accordingly, the panel did not address the Nation's argument that its complaints also arise from different operative facts, which was an independent basis to reverse the CFC. The government errs in suggesting (Pet. 15 n.2) that the Court of Appeals "accepted *arguendo*" the determination that the operative facts in the Nation's two complaints "are the same." Given its holding, the Court of Appeals simply did not need to address this issue.

accounting, on the one hand, and in the CFC for money damages "for the injuries and losses . . . resulting from the United States' failure to properly manage the Nation's assets to obtain the maximum value," on the other. App. 10a-12a.

The court rejected the CFC's identification of two areas of "what looks like overlapping relief." App. 12a (citation omitted). First, it concluded that to the extent both complaints seek to recover relief in the form of money, the complaints do not seek the same money. *Id.* at 12a-13a. In the district court, the Nation requested a restatement of its trust account balances "to reflect the correct amounts to correct any errors discovered in the accounting." *Id.* at 13a. The court held that this request was for "old money," or "money that is already in the government's possession, but that erroneously does not appear in the Nation's accounts." *Id.* By contrast, the Nation sought "new money" in the CFC as "damages for the injuries and losses" resulting "from the United States' failure to properly manage the Nation's assets to obtain maximum value." *Id.* The damages sought in the CFC were "essentially consequential damages – profits that the Nation would have made but for the United States' mismanagement." *Id.*

The Court of Appeals emphasized that the relief requested in each court posed "no risk of double recovery." App. 18a. In the CFC, the Nation sought only "'new money' damages – relief that the Nation has not requested in district court, and which the district court is, in any event powerless to award." *Id.* (citing 5 U.S.C. § 702). Conversely, the court held, the Nation's

complaint in district court sought an equitable accounting and restatement – "separate equitable relief, which the Court of Federal Claims is powerless to award." *Id.*

The Court of Appeals also rejected the government's argument that the Nation had requested an accounting in both courts. App. 15a. In the CFC, the Nation's prayer for relief requested damages, not an accounting. Merely because the CFC could employ an accounting in aid of judgment if the Nation were to satisfy its burden of proving liability in the CFC did not "transform the Nation's unambiguous request for damages into a request for an accounting." *Id.*

Judge Moore dissented but did not disagree with the majority's holding on the law. Instead, while acknowledging that it would be possible to craft two complaints to avoid § 1500 by requesting "old money" in one court and "new money" in the other, Judge Moore read the Nation's CFC Complaint more broadly than the majority to include requests both for "old" and "new" money. App. 23a-24a.

The government filed a combined petition for panel rehearing and rehearing en banc. Both aspects of the petition were denied without dissent.

REASONS FOR DENYING THE PETITION

The decision of the Federal Circuit does not conflict with any decision of this Court or any other court of appeals nor does it present any other compelling reasons for certiorari. Therefore, the petition should be denied.

I. REVIEW IS NOT WARRANTED TO RECONSIDER THE WELL-SETTLED RULE THAT SECTION 1500 DOES NOT BAR SUITS THAT SEEK DIFFERENT RELIEF.

Despite failing to ask the Court of Appeals to revisit its precedent, the government argues for the first time here that this Court should grant review in order to overturn the rule adopted in *Casman* and reaffirmed by the Federal Circuit sitting en banc in *Loveladies*. Contrary to more than five decades of precedent in the lower courts, the government argues that § 1500 precludes jurisdiction when "a plaintiff has a second suit pending that is based on substantially the same operative facts as the CFC claim, even if the other suit seeks different relief." Pet. 15. This Court's review is not warranted to revisit the rule in *Casman*.

A. The Same Relief Requirement Is Settled Precedent That Does Not Warrant This Court's Review.

It was settled law at the time the Nation filed its complaints that two suits seeking different relief do not implicate § 1500. Overturning that rule in this case would upset the reasonable expectations of the Nation,

as well as many other litigants that have filed complaints in reliance on that rule. The Court of Claims settled the issue in *Casman* in 1956 and the courts have consistently applied this principle since then. *See, e.g.*, *Boston Five Cents*, 864 F.2d 137; *Truckee-Carson*, 223 Ct. Cl. 684; *Allied Materials*, 210 Ct. Cl. 714; *see also* note 2, *supra*. Although the Federal Circuit questioned the rule in *dicta* in *UNR*, this Court declined to repudiate *Casman* in *Keene*, the Federal Circuit sitting en banc reaffirmed the rule more than 15 years ago in *Loveladies*, and since then, the CFC and the Federal Circuit have applied the rule several dozen times.

As this Court has recognized, "considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what [the courts] have done." *Shepard v. United States*, 544 U.S. 13, 23 (2005) (brackets in original) (citation and quotations omitted); *see also John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008) (refusing to reverse settled interpretation of statute of limitations governing suits in the CFC). In this case, Congress has "long acquiesced," *John R. Sand & Gravel*, 552 U.S. at 139, in the interpretation of § 1500 set forth in *Casman* and *Loveladies*. Indeed, it has not taken action to overturn the rule in the nearly 55 years since *Casman* or in the more than 15 years since *Loveladies*.

Beyond that, settled precedent is accorded particular weight in the interpretation of § 1500. As this Court recognized in *Keene*, the "exact nature of the things to be compared is not illuminated . . . by the

awkward formulation of § 1500." 508 U.S. at 210. Therefore, "earlier readings" of the statute (including those of the Court of Appeals) take on particular importance in the interpretation of this statute. *Id.* In *Keene*, the Court followed the decision of the Court of Claims in *British American Tobacco*, which had "settled a key question" regarding whether two actions based on different legal theories were enough to avoid § 1500's bar. *Id.* at 211. In the same way here, it has long been the settled rule in the Federal Circuit (the only Court of Appeals charged with interpreting the statute, *see* Pet. 30 n.8) that § 1500 does not apply where two suits seek different relief.

Congress has taken no action to reverse the rule, and in fact, has adopted it. *Casman* was established law when Congress "reenacted" § 1500 in 1982 to change the name of the court to which it applied. *See* Federal Courts Improvement Act of 1982, § 133(e)(1), 96 Stat. 40 (substituting the "United States Claims Court" for the "Court of Claims"). As this Court held in *Keene*, where there is "no reason to doubt" that a case represents "settled law" at the time Congress reenacts it, the "presumption" applies "that Congress was aware of these earlier judicial interpretations and, in effect adopted them." *Keene*, 508 U.S. at 212; *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).[4] As *Keene* makes clear, Federal Circuit cases can establish settled precedent for purposes of § 1500.

4. Congress amended § 1500 again on October 29, 1992 to substitute "Court of Federal Claims" for "Claims Court." Court of Federal Claims Technical and Procedural Improvements Act

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Therefore, this Court should decline to revisit this settled rule.

B. The *Casman* Rule Is Consistent With The Text And Purposes Of Section 1500.

In any event, this Court's review is not warranted because the government's reading of § 1500 is wrong. According to the government, if a litigant can obtain complete relief only by filing complaints in two different courts, § 1500 requires the litigant to make a choice between relief. Pet. 19 (§ 1500 requires "a plaintiff to elect between a CFC claim and a factually related suit seeking 'different relief'"). As the Court of Claims in *Casman* described the choice the government seeks to impose: "'If you want your job back you must forget your back pay'; conversely, 'If you want your back pay, you cannot have your job back.'" 135 Ct. Cl. at 650. That reading would destroy the careful and logical judicial development of § 1500 explained above and replace it with a result that Congress did not intend.

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of 1992, § 902(a), 106 Stat. 4516. Although the Federal Circuit purported to overrule *Casman* in *dicta* on April 23, 1992, Keene filed a petition for writ of certiorari on July 22, 1992, and this Court granted the petition on October 19, 1992. Therefore, the Federal Circuit's ruling in *UNR* purporting to overrule *Casman* was in no way a "settled judicial construction" at the time of reenactment. *See Keene*, 508 U.S. at 212-13 ("presumption does not apply when there is no 'settled judicial construction' at the time of reenactment").

As this Court recognized in *Keene*, 508 U.S. at 206, the statute's bar on "duplicative lawsuits" is illustrated by the circumstances that led to enactment of the statute in 1868. The statute was enacted to prevent cotton claimants from having two "bites at the apple" when suing to recover for confiscated property in two different courts. Those suits involved the same wrongful conduct and sought the same relief. *See id.* at 206-207. "It was these duplicative lawsuits that induced Congress" to enact § 1500. *Id.* at 206. The purpose was to require a litigant to elect a single forum in which to seek a given remedy. *See Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1564 (Fed. Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989).

Contrary to the government's expansive reading of § 1500, the statute was not designed to compel litigants to choose between relief available only in one court and that available only in another. No case has ever applied § 1500 in such a way to make it impossible for a plaintiff to craft his complaints to obtain full and complete relief. *See Johns-Manville*, 855 F.2d at 1564 ("[Section 1500] was intended to force an election where both forums could grant the same relief, arising from the same operative facts."); *Allied Materials*, 210 Ct. Cl. at 716 ("In neither court could [the plaintiff] combine all its claims. In these circumstances Sec. 1500 does not [apply]."); *Casman*, 135 Ct. Cl. at 649 ("Here the plaintiff obviously had no right to elect between courts."). Nor does the government identify any basis in the statutory text or congressional purpose for such an inequitable result.

The effect of the government's reading would be to deny litigants the ability to pursue legitimate claims. For example, a litigant would be forced to decide whether to seek reversal of an unlawfully denied permit in the district court, or money damages resulting from the unlawful denial in the CFC, but could not obtain both. *See Loveladies*, 27 F.3d at 1545. Other litigants would have to decide whether to forego injunctive relief to prevent future harm in order to obtain money damages for past harm. *See, e.g.*, *Boston Five Cents*, 864 F.2d at 139-40; *Truckee-Carson*, 223 Ct. Cl. 684. Or, as in this case, a tribe would have to decide whether to seek a general accounting to secure information about its trust assets or to abandon that right in favor of a suit for money damages.[5] Such a result finds no support in the text, purpose, or precedent of § 1500.

Contrary to the government's assertions (Pet. 15-19), the text of the statute does not support this dramatic departure from established precedent. The government argues that the statute, which is triggered by (1) "any suit or process" (2) "for or in respect to" the plaintiff's "claim" in the CFC, must be read to apply whenever a litigant has another suit pending that is "*associated in any way*" with the CFC claim. Pet. 15-17 (emphasis added).

5. It is of no consequence that a litigant could file a suit first in the district court on the hope that when final judgment issues, the six-year Tucker Act limitations period will not have expired. That would merely invite the government to stall the district court action to block access to the monetary claim.

That the statute applies to "any suit or process" is unremarkable. The phrase refers to the nature of the proceedings outside the CFC that might trigger § 1500. *See UNR Indus., Inc. v. United States*, 920 F.2d 916, 917 (Fed. Cir. 1990) ("There can be no doubt that a petition for writ of certiorari is a 'suit or process' within the meaning of § 1500."). It does not define or expand the nature of the claims that must be compared.

With respect to the second phrase, this Court already declined in *Keene* to adopt the government's expansive reading of that phrase. There, the government argued that a suit is "in respect to" a claim in the CFC if it is merely a "related action." Brief of United States at 16, Keene v. United States, 508 U.S. 200 (1993) (No. 92-466). This Court rejected the government's proffered standard. Instead, the Court held the suit must be "based on substantially the same operative facts as the Court of Claims action, at least if there was some overlap in the relief requested." 508 U.S. at 212. To be sure, the "in respect to which language" makes clear that Congress did not intend the statute "to be rendered useless by a narrow concept of identity." *Id.* at 213. But distinguishing between claims that seek different relief hardly renders the statute "useless." Furthermore, as the Federal Circuit recognized in *Loveladies*, "[v]iewing claims as related to the nature of the relief sought is unremarkable." 27 F.3d at 1550. And using "differing relief as a characteristic for distinguishing claims [is] especially appropriate here, because the [CFC] and its predecessors have been courts with limited authority to grant relief." *Id.*

Finally, the government is incorrect that requiring plaintiffs to "elect between suing in the CFC and suing in another court" on a different legal theory is "not materially different" from requiring a plaintiff to elect between two suits seeking "different relief." Pet. 19-20. The former rule holds that § 1500 applies where a plaintiff pursues the same relief in two courts by merely attaching a different legal label to the cause of action. The latter rule holds that litigants must elect one remedy and abandon another, which does not serve the statute's purpose to preclude "duplicative lawsuits." *Keene*, 508 U.S. at 206.

C. Even If The Court Were Inclined To Review The Same Relief Requirement, This Case Is A Poor Vehicle For Doing So.

There are other reasons this Court's review is not warranted to revisit the settled interpretation of § 1500 regarding the same relief requirement. First, the government never asked the appellate panel or the en banc court to revisit and overturn *Casman* and *Loveladies*. Even if the argument is not waived because it is jurisdictional, review is not warranted here because "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998) (citation omitted); *see also Adams v. Robertson*, 520 U.S. 83, 91 (1997) (Requiring litigants to raise arguments in the lower courts "assists us in our deliberations by promoting the creation of an adequate factual and legal record" and gives the parties the opportunity to "test and refine their positions before reaching this Court.").

Second, different from many other cases that, without dispute, involve claims for different relief but the same operative facts (and therefore present an opportunity to review only the rule in *Casman* and *Loveladies*), in this case, the Nation also contends that the two cases do not involve the same wrongful conduct on the part of the government (or operative facts). *See* pp. 10, 12 n.3, *supra*. This argument presents an independent basis to reverse the CFC. Therefore, if review were granted and the Federal Circuit were reversed, this issue would still need to be addressed by this Court or the court below.

II. REVIEW IS NOT WARRANTED TO CONSIDER WHETHER THE FEDERAL CIRCUIT CORRECTLY APPLIED A SETTLED RULE TO THE PARTICULAR COMPLAINTS IN THIS CASE.

The government also challenges the Federal Circuit's fact-bound application of the settled rule in *Casman* and *Loveladies* to the particular relief requested in the Nation's complaints. Pet. 20-25. However, "a petition for certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." S. Ct. R. 10. This is not one of those rare cases.

As an initial matter, although the government highlights the dissenting opinion (Pet. 23-24), it fails to mention that the dissent did not disagree with the majority's reading of the law; it merely disagreed with the majority's reading of the complaints. *See* App. 14a ("The dissent acknowledges that it would be possible to craft two complaints to avoid § 1500 by requesting

'old money' in one, and 'new money' in the other."); *id.* at 23a (Moore, J., dissenting) ("It seems plausible that carefully drafted complaints could distinguish particular pots of money as different relief."). Such a fact-bound interpretation of the two complaints in this case is not appropriate for this Court's review.

The government raises several other challenges (not made in the dissent) to the Federal Circuit's application of the rule in *Casman* and *Loveladies* to the particular facts of this case. First, it argues that if suits for different relief do not trigger § 1500, then the bar may be avoided only if a litigant (as in *Casman*) seeks solely injunctive relief in one court and monetary relief in the other. If both suits seek any relief in the form of money – irrespective of any differences in the categories or amounts of money requested – § 1500 applies. Pet. 21. Therefore, the government concludes, the Federal Circuit erred by concluding that "monetary relief in the CFC and monetary relief in district court are 'completely different' for purposes of Section 1500." *Id.*

The lower court correctly rejected as wholly unsupported that "sweeping rule." App. 9a. Where the plaintiff requests relief in the form of money in each case, the "relief sought" is the same only where the same money is at issue. Otherwise, the government is not subjected to a risk of double liability. *See id.* at 9a, 18a; *Dico*, 48 F.3d 1199 (holding that § 1500 applies where the amount of money requested in both judicial fora was identical, and represented the identical measure of compensation); *Cooke*, 77 Fed. Cl. at 178 (no risk of double liability where relief could be granted in each

case for different form and measure); *OSI*, 73 Fed. Cl. at 45 (two claims were not the same when each sought different measure and amount of money).

This application of the rule is not "inconsistent" with this Court's decision in *Keene*. Pet. 20, 21. To be sure, the Court held in that case that the rule in *Casman* was inapplicable because Keene sought "monetary relief" in both the CFC and the district court. 508 U.S. at 216. But in *Keene*, the plaintiff's suits did not merely seek recovery of monetary relief; they sought recovery of the *same* money, at least in significant part – reimbursement for payments made to individuals claiming injury or death due to asbestos products supplied in accordance with government specifications. *Id.* at 203-05.

In contrast, in this case the Federal Circuit accurately concluded that the equitable relief the Nation requested in connection with the accounting (an adjustment of its account balances to reflect the correct amounts) "is not the same as the 'damages for the injuries and losses' that the Nation has requested in the [CFC] . . . resulting from the United States' failure to properly manage the Nation's assets to obtain the maximum value." App. 13a. The former is a request for the "return of 'old money' that belongs to the Nation but erroneously does not appear on its balance sheet" while the latter seeks "damages in the form of 'new money' that the Nation should have earned as profit but did not." *Id.* at 13a-14a. Since the suits do not seek the same money at all, § 1500 does not apply. *Id.*

Nor is the government correct that the Federal Circuit's holding depends upon a "technical law-equity distinction." Pet. 21. It is true the Federal Circuit recognized the "careful separation of equitable relief and money damages is critical to the analysis" in this case. App. 12a. But that is not because it is "dispositive" that one complaint demands equitable relief while the other seeks money damages,[6] Pet. 21; rather, it is because the Nation's careful tailoring of the relief requested in each complaint, consistent with the jurisdiction of each court, is relevant to the determination whether the relief sought in this case is "duplicative." *Keene*, 508 U.S. at 206.

The Federal Circuit recognized in this case there is "no risk of double recovery" because the Nation tailored its requests for different relief in each court to the jurisdiction of each court to award the relief. App. 18a. Specifically, it requested "damages" in the CFC to compensate it for the failure of the United States properly to manage the Nation's assets to obtain the maximum value. *Id.* at 13a. The Nation did not request that compensatory relief (or "new money") in the district

6. The government claims that this Court would have reversed rather than affirmed in *Keene* if the Federal Circuit's holding were correct because Keene sought to be reimbursed for the same money through the equitable remedy of indemnification/contribution in the district court and contract damages in the CFC. Pet. 22. Even if the government's characterization of the relief sought in *Keene* is correct, as noted above, § 1500 applied to bar Keene's claim because he sought *the same money* in both courts, thus subjecting the government to the risk of double recovery. Different from *Keene*, in this case there was "no risk of double recovery." App. 18a.

court, which is, "in any event, powerless to award" it. *Id.* at 18a; *see* 5 U.S.C. § 702 (excluding district court actions seeking "money damages" from waiver of sovereign immunity). On the other hand, the Nation specifically limited the relief it sought in the district court (consistent with that court's jurisdiction) to an equitable accounting and restatement of its accounts – specific relief (including the return of "old money") that is not duplicative of the compensatory damages sought in the CFC. *See* App. 18a. Thus, what is dispositive is not whether the two complaints seek equitable or legal relief, but whether the two complaints seek duplicative relief in the form of the same money in both courts.

Finally, the government argues that the Nation's suits seek the same relief because an "accounting" may "be necessary" in the CFC. Pet. 24. That is incorrect for two reasons. First, as the Federal Circuit recognized, there is no request for an accounting in the CFC Complaint and it is the relief the plaintiff "*requests*" that matters under § 1500. App. 15a (citing *Keene*, 508 U.S. at 212). Second, the government's argument reflects a fundamental misunderstanding of the pre-liability equitable accounting sought (and only available in) the district court and the accounting in aid of judgment, which is a litigation tool available to the CFC to calculate an award of damages. The pre-liability equitable accounting that is the gravamen of the District Court Complaint is principally informational and will require the government to render a detailed account of all of the lands, funds, and resources it holds in trust. G. Bogert *et al.*, *The Law of Trusts and Trustees* § 963 (2d ed. 1983) ("The trustee . . . owes his beneficiary a duty to render at suitable intervals . . . a formal and

detailed account of its receipts, disbursements, and property on hand, from which the beneficiary can learn whether the trustee has performed his trust and what the current status of the trust is."). The obligation to account exists irrespective of any showing of liability or entitlement to damages; it is a freestanding and fundamental trust obligation of the trustee without precondition. *Id.* An accounting in aid of judgment (which was not requested and may not be necessary in the CFC), on the other hand, is not a form of relief at all; it is a litigation tool available in the CFC to calculate an award of damages. *See Klamath & Modoc Tribes*, 174 Ct. Cl. at 491. The scope is extremely narrow; it is derivative of, and inextricably tied to, an antecedent determination of liability and therefore is confined to determining damages for the specific, proven breach of a trust duty. It does not extend to all of the property held in trust for the beneficiary or to all information necessary for the beneficiary readily to ascertain whether the trust has been faithfully carried out, as does the equitable accounting requested in the district court. Therefore, the government is incorrect to suggest in any way that the Nation has requested this relief in the CFC or that § 1500 applies to this case on this basis.

III. REVIEW IS NOT WARRANTED TO ADDRESS POLICY CONSIDERATIONS AND *DICTA* IN THE FEDERAL CIRCUIT'S DECISION.

The government also seeks review based on the Federal Circuit's *dicta* and discussions of policy considerations in the decision below. These issues provide no basis for certiorari.

A. The Time Of Filing Rule Is Not Presented Here.

First, the government objects to the Federal Circuit's observation in *dicta* that § 1500 does not actually prevent a plaintiff from filing two actions seeking the same relief for the same claims because a claimant may avoid the jurisdictional bar, pursuant to *Tecon Engineers v. United States*, 343 F.2d 943, by simply filing its CFC complaint first. Pet. 26-28. That observation does not provide a basis for this Court's review, however, because, as the government concedes (*id.* at 27 n.5), the rule adopted in *Tecon* is not presented in this case.

The Nation does not dispute that it filed its complaint in the district court one day prior to its complaint in the CFC, so the Nation's claims were pending in the district court at the time it filed its claims in the CFC. Therefore, were the Court to review the holding in *Tecon* in this case, any ruling regarding its viability would have literally no impact in this case and thus would represent an impermissible advisory opinion. *See Coffman v. Breeze Corps.*, 323 U.S. 316, 324 (1945). This Court already rejected that approach in *Keene*. As the government points out (Pet. 26), the en banc Federal Circuit once repudiated *Tecon* in *UNR*, 962 F.2d at 1021-23. But when this Court affirmed in *Keene*, it overturned this aspect of *UNR* precisely because, as here, it was "unnecessary for the Court to address the *Tecon* question in ruling on the dismissal of Keene's claims." 508 U.S. at 216 (citation and quotations omitted).

In any event, the *Tecon* rule is settled precedent that was unequivocally reaffirmed after *UNR*. *See Hardwick Bros. Co. II v. United States*, 72 F.3d 883,

886 (Fed. Cir. 1995) ("After *UNR/Keene* and *Loveladies I*, *Tecon Engineers* remains good law and binding on this court."). As with the rule in *Casman*, this rule was long-settled when Congress reenacted § 1500 in 1982 and Congress has taken no steps to overturn it in the 45 years it has been settled law. *See* pp. 16-17, *supra*. Therefore, the discussion in the lower court's decision regarding the "jurisdictional dance" required by § 1500, and the continued viability of the *Tecon* holding, provide no basis for this Court's review.

B. The Government Is Incorrect That The Federal Circuit Invoked Policy Considerations To Expand The Jurisdiction of the CFC.

Contrary to the government's contention (Pet. 28-29), the Federal Circuit did not invoke a "policy rationale" that the "nation is served by private litigation" against the sovereign that can "control the excess to which Government may from time to time be prone" to narrow the scope of § 1500 and expand the jurisdiction of the CFC. The government takes this quote out of context. This quotation is from a longer passage in *Loveladies*, which the Federal Circuit cited in response to the government's arguments that the statute's policy and purpose favor dismissal. The opinion below noted that the government's attempt to rationalize the application of § 1500 "rings hollow" and is of "no real consequence in this appeal" because the statute no longer serves its original purpose. App. 17a. For this reason, the court "ought not extend the statute to allow the Government to foreclose non-duplicative suits, and to deny remedies the Constitution and statutes otherwise provide." *Id.* at 18a (quoting

Loveladies, 27 F3d at 1555-56). In other words, policy arguments notwithstanding, § 1500 should be read no more broadly than required by the statute's text.

There is no contradiction between this rejection of the government's policy arguments and the interpretive rule that a waiver of sovereign immunity must be strictly construed in favor of the government. First, § 1500 is not a waiver of sovereign immunity. *See Johns-Manville*, 855 F.2d at 1565 (§ 1500 is "solely jurisdictional"); *see also Lane v. Pena*, 518 U.S. 187, 192 (1996) (waivers of sovereign immunity must be "unequivocally expressed"). It is, as the government recognizes (Pet. 29), a jurisdictional limitation that is separate from the waiver of sovereign immunity in the Tucker Act, 28 U.S.C. § 1491(a)(1), and the Indian Tucker Act, 28 U.S.C. § 1505. Therefore, the canon of construction that waivers of sovereign immunity must be construed in favor of the sovereign does not apply to § 1500.

Second, even if § 1500 does constitute a waiver of sovereign immunity, the canon construing such waivers in favor of the sovereign cannot simply be invoked in any circumstance to "compel a broad reading of § 1500." *Griffin v. United States*, 85 Fed. Cl. 179, 187 (2008). As this Court recognized in *Richlin Security Service Co. v. Chertoff*, 128 S. Ct. 2007 (2008), "[t]he sovereign immunity canon is just that – a canon of construction. It is a tool for interpreting the law, and we have never held that it displaces the other traditional tools of statutory construction"; instead, it must be used "in tandem" with other tools of construction. *Id.* at 2019. Thus, invocation of the canon alone will not support the imposition of limitations on the CFC's review or expansion of § 1500's

jurisdictional bar beyond its text. *See Franconia Assocs. v. United States*, 536 U.S. 129, 145 (2002); *Bowen v. City of New York*, 476 U.S. 467, 479 (1986); *Griffin*, 85 Fed. Cl. at 188 & n.6.

IV. THE GOVERNMENT'S CLAIMS OF ADVERSE CONSEQUENCES ARE EXAGGERATED AND DO NOT WARRANT THIS COURT'S REVIEW.

The government's claim that failure to review the Federal Circuit's decision would result in "significant adverse consequences" to the government (Pet. 30-31) is meritless. Although this Court has not itself reviewed and affirmed the rule in *Casman*, the lower courts have applied it regularly for more than five decades without mishap. As the government acknowledges, there is no circuit split here and little opportunity for one to develop. Pet. 30 & n.8. That fact counsels against review, not in favor of it, particularly where the decision below involves the mere application of a well-settled rule that Congress has taken no action to upset and has even adopted through reenactment. *See* pp. 16-17, *supra*.

Furthermore, the particular issue raised here – whether a tribe's claim for money damages in the CFC involves the same relief as its demand for an equitable accounting in the district court – is one of limited applicability. True, the issue is raised in a number of suits filed recently by Indian tribes in district courts seeking to compel the government finally to comply with its basic trust duty to provide an accounting, while the tribes also preserve and pursue their rights to obtain money damages in the CFC for the government's failure to invest and manage the tribes' trust assets. But this case has limited or no applicability outside the Indian trust context.

Moreover, even if the government were correct that these suits involve the same operative facts and the same relief (it is not), the decision below would not impose a "substantial litigation burden" on the United States and the courts, nor "threaten[] inconsistent judicial rulings" to permit the cases to proceed. Pet. 31. As the trial court itself recognized, if the filing dates of the complaints had been reversed and the cases had been permitted to proceed on that basis alone, the "two courts would use traditional principles of comity, collateral estoppel, and res judicata to sort out any duplication."[7] App. 55a n.16. And as in any complex litigation, courts have numerous techniques available to eliminate duplicative effort. *See Manual for Complex Litigation (Fourth)* § 20.14 (2004) (even when related cases pending in different districts cannot be joined together, judges may coordinate proceedings in a variety of ways including joint appointment of a special master, coordination of discovery, joint depositions, and making relevant discovery available in all cases). Further, either court could impose a stay in one case while the other proceeds. *See id.*; *Loveladies*, 27 F3d at 1547 (suit in CFC was stayed pending outcome of district court litigation).

In sum, it is not the case that the government faces "significant adverse consequences" from the ruling in the court below. Therefore, this Court's review is not warranted.

7. The courts would need to apply the same techniques if the complaints were filed seriatim, since § 1500 applies only to bar simultaneous suits, not a suit in the CFC that is the same as a suit already litigated to completion in another forum.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RAYMOND M. BENNETT
KILPATRICK STOCKTON LLP
3737 Glenwood Avenue
Suite 400
Raleigh, NC 27612
919-420-1700

KEITH M. HARPER
Counsel of Record
G. WILLIAM AUSTIN
CATHERINE F. MUNSON
KILPATRICK STOCKTON LLP
607 14th Street, N.W.
9th Floor
Washington, D.C. 20005
kharper@
kilpatrickstockton.com
202-824-1448

ADAM H. CHARNES
KILPATRICK STOCKTON LLP
1001 West Fourth Street
Winston-Salem, NC 27101
336-607-7300

Counsel for Respondent

REPLY BRIEF

No. 09-846

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

TOHONO O'ODHAM NATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

ELENA KAGAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF AUTHORITIES

Cases: Page

Alexander v. *Sandoval*, 532 U.S. 275 (2001) 4

Casman v. *United States*, 135 Ct. Cl. 647 (1956) 3

Donnelly v. *United States*, 28 Fed. Cl. 62 (1993) 4

Keene Corp. v. *United States*, 508 U.S. 200 (1993) . *passim*

Loveladies Harbor, Inc. v. *United States*, 27 F.3d 1545 (Fed. Cir. 1994) 11

Tecon Eng'rs, Inc. v. *United States*, 343 F.2d 943 (Ct. Cl. 1965), cert. denied, 382 U.S. 976 (1966) 10

UNR Indus., Inc. v. *United States*, 962 F.2d 1013 (Fed. Cir. 1992) 4

Statute and rule:

28 U.S.C. 1500 ..... *passim*

Fed. R. Civ. P. 54(c) 8

CFC R. 54(c) 8

Miscellaneous:

10 James Wm. Moore et al., *Moore's Federal Practice* (3d ed. 2009) 8

In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The Federal Circuit held that 28 U.S.C. 1500—which deprives the Court of Federal Claims (CFC) of jurisdiction over "any claim for or in respect to which" the plaintiff has "any suit or process" against the United States pending in any other court—permits respondent to maintain two simultaneous actions against the United States arising from the "same operative facts" because the actions do not seek the "same relief." The court further reasoned that the two suits do not seek the same relief, even though both request a monetary recovery, because the relief is "legal" in one action and "equitable" in the other. Pet. App. 10a-12a, 15a. As the petition explains, the Federal Circuit's decision finds no support in the text of Section 1500's broad prohibition on CFC jurisdiction; the decision's reasoning is inconsistent with this Court's interpretation of Section 1500 in *Keene*

Corp. v. *United States*, 508 U.S. 200 (1993); and the decision resolves incorrectly important questions on which *Keene* reserved decision.

Respondent does not proffer a meaningful textual defense of the Federal Circuit's decision. It instead argues that review is unwarranted on the grounds that the Federal Circuit's "same relief" standard is settled precedent, policy considerations support the Federal Circuit's rule, and this case presents a poor vehicle for resolving the question presented. None of those contentions has merit or provides a sound basis for declining review.

This Court in *Keene* explained that the text of Section 1500 must not be "rendered useless by a narrow concept" of the types of suits triggering its jurisdictional bar, and emphasized that lower courts may neither "disregard[] nor evade[]" Section 1500's "limits upon federal jurisdiction" even though those limits may "deprive plaintiffs of an opportunity to assert rights." 508 U.S. at 207, 213, 217. The Federal Circuit, however, has now declared that it can no longer find "any purpose that § 1500 serves," pointing to its earlier decisions eroding the statute to the point that plaintiffs need engage in "nothing more than a 'jurisdictional dance'" to circumvent the statute. Pet. App. 16-17a (citation omitted). The court of appeals thus candidly warns that, "[w]hatever viability remains in § 1500," it will not apply Section 1500's bar "absent a clear expression of Congressional intent" requiring that application. *Id.* at 18a (citation omitted). That approach to an explicit limitation on Congress's waiver of the United States' sovereign immunity is exactly backwards. Pet. 29. The Federal Circuit's decisions since *Keene* have effectively rendered Section 1500 all but a dead letter, improperly displacing

Congress's "authority to define the jurisdiction of the lower federal courts," 508 U.S. at 207. This Court should not allow the Federal Circuit's decision in this case to be the last word on that court's evisceration of jurisdictional limitations it is charged with enforcing.

1. Respondent's leading contentions (Br. in Opp. 15-18 (Opp.)) are variations on one theme: *Casman* v. *United States*, 135 Ct. Cl. 647 (1956), held that Section 1500 does not apply if a plaintiff seeks "entirely different" relief in the CFC and another court, *id.* at 650, and, in respondent's view, that holding is "settled law" for which no review is warranted. Those contentions are meritless.

First, respondent incorrectly asserts (Opp. 16) that *Casman* should be given *stare decisis* effect. No lower court decision has such effect in this Court.

Second, respondent errs in arguing (Opp. 16-17) that *Casman* reflects the kind of "settled precedent" to which *Keene* looked in interpreting Section 1500. *Keene* relied on this Court's own authoritative rulings and one Court of Claims decision reflecting what the Court independently found to be a "sensible reading" of Section 1500's predecessor because all of those decisions existed in 1948 when Congress adopted Section 1500 by "reenact[ing] the [relevant] language" from its predecessor provision. *Keene*, 508 U.S. at 210-213. *Casman* did not exist in 1948 and could not have influenced the Congress that enacted Section 1500's relevant text.

Nor did Congress later ratify *Casman* by adopting technical amendments to Section 1500 that updated the name of the relevant court from the "Court of Claims" to the "United States Claims Court" (in 1982) and the "United States Court of Federal Claims" (in 1992). Cf. Opp. 17. The presumption that Congress intends to

adopt earlier judicial interpretations of a statutory provision has no application when, as in 1982 and 1992, Congress "has made only isolated amendments" and has "not comprehensively revised a statutory scheme." *Alexander* v. *Sandoval*, 532 U.S. 275, 292 (2001). Moreover, even respondent admits that the presumption applies only in the presence of a settled judicial interpretation, Opp. 18 n.17, and, before Congress last amended Section 1500 (in 1992), the en banc Federal Circuit had made clear that "*Casman* and its progeny [were] no longer valid." *UNR Indus., Inc.* v. *United States*, 962 F.2d 1013, 1025 (1992). *UNR Industries*' repudiation of *Casman*, although not strictly necessary for the court's decision, reflects that, in 1992, *Casman*'s restrictive reading of Section 1500 was far from settled even within the Federal Circuit. Cf., *e.g.*, *Donnelly* v. *United States*, 28 Fed. Cl. 62, 64 (1993) (dismissing CFC claim under Section 1500 and rejecting plaintiff's reliance on *Casman* because the Federal Circuit had "expressly overruled" *Casman*).

Similarly, in 1993, when this Court interpreted Section 1500 in *Keene*, the en banc Federal Circuit had abandoned what this Court correctly characterized as *Casman*'s "'judicially created exception[] to § 1500,'" *Keene*, 508 U.S. at 215-216. See *UNR Indus.*, 962 F.2d at 1020, 1024-1025. And against that background, *Keene* found it "unnecessary to consider" whether the then-repudiated *Casman* exception should be revisited. 508 U.S. at 212 n.6, 216. Now that the Federal Circuit has reversed course and re-embraced *Casman*, review is warranted to resolve the question on which *Keene* reserved decision.

Third, even if Section 1500 could be construed to allow for a judicially created exception when a plaintiff

seeks "distinctly different *types* of relief" in two cases—such as monetary back-pay relief in the CFC and prospective reinstatement to federal employment in district court, as in *Casman*—such a narrow exception for "completely different relief" would be unavailable here. See *Keene*, 508 U.S. at 212 n.6, 216 (emphasis added); Pet. 18-19 & n.3, 21. Respondent's two suits do not seek "completely different relief": respondent seeks monetary relief in both of its suits, and in addition seeks in district court an accounting as a predicate for monetary relief, thereby duplicating the accounting that would be necessary in the CFC to calculate damages. The Federal Circuit's decision allowing the CFC suit to proceed thus dramatically expands the scope of what this Court identified as a very "limited" exception, *Keene*, 508 U.S. at 214 n.9 (discussing *Casman*), which itself finds no support in Section 1500's text or purpose.

2. a. Respondent attempts to defend (Opp. 18-22) the Federal Circuit's holding that Section 1500 does not apply if a plaintiff's CFC claim and another suit do not "seek the same relief." Pet. App. 7a, 10a. But respondent's defense of that holding is unavailing and in any event provides no sound reason for this Court to decline review.

The Federal Circuit's holding cannot be squared with Section 1500's text, which broadly proscribes CFC jurisdiction whenever the CFC plaintiff has a related suit arising from substantially the same operative facts pending in another court, even if the suits seek different relief. See Pet. 15-19. Respondent provides no analysis of the statutory text, which demonstrates by the use of the phrase "in respect to" that another suit need only be related to a CFC claim to bar CFC jurisdiction. Instead, respondent simply asserts (Opp. 21) that *Keene*

"rejected the government's proffered standard." That is incorrect. *Keene* expressly reserved the question "whether two actions based on the same operative facts, but seeking completely different relief, would implicate § 1500." 508 U.S. at 212 & n.6. Even the Federal Circuit acknowledged as much in its decision in this case. Pet. App. 7a.

Respondent resorts to the atextual contention (Opp. 18-20) that Section 1500 should not be read to "deny litigants the ability to pursue legitimate claims" in two courts. Opp. 20. But *Keene* rejected such "policy arguments" as "addresse[d] [to] the wrong forum." 508 U.S. at 217. The Court specifically recognized that Section 1500 may operate "to deprive plaintiffs of an opportunity to assert rights," and held that Section 1500 nonetheless must be enforced according to its terms because courts "enjoy no 'liberty to add an exception . . . to remove apparent hardship.'" *Id.* at 217-218 (citation omitted). That logic applies equally to *Casman*'s 'judicially created exception[]' to § 1500," *id.* at 216.

Moreover, *Keene* makes clear that Section 1500 requires dismissal even if a plaintiff's district court action is based "on a [different] legal theory" that "could [not] have been pleaded" in the CFC. 508 U.S. at 213; see *id.* at 212-214. That result does not materially differ from one that prohibits a plaintiff from maintaining related suits seeking supposedly different relief. Pet. 19-20. For example, Section 1500 clearly precludes CFC jurisdiction when a plaintiff proceeds on a contract theory in the CFC and a tort theory in district court. *Keene*, 508 U.S. at 212. It therefore forces the plaintiff to elect between two types of monetary relief governed by different legal standards. That election may lead to the plain-

tiff's recovery of no relief or a different measure of relief than would have been available in the other suit.

b. Rather than defend the Federal Circuit's holding that Section 1500's jurisdictional bar can be avoided if a plaintiff seeks "legal" monetary relief in the CFC and "equitable" monetary relief in district court, see Pet. 20-23, respondent contends that "whether the two complaints seek equitable or legal relief" is not "dispositive." Opp. 27. That assertion, however, is not reflected in the Federal Circuit's analysis. After emphasizing that "injunctive relief is 'different' * * * from money damages," the court "look[ed] to each complaint's prayer for relief" to decide "whether the relief that [respondent] requested in its [CFC] complaint is the same as the relief that it requested in its district court complaint." Pet. App. 10a. The court specifically focused on whether the respective prayers sought "equitable" monetary relief or "legal" monetary relief, *id.* at 10a-12a, and made clear that respondent's "separation of equitable [monetary] relief and money damages [was] critical to [its] § 1500 analysis." *Id.* at 12a. The Federal Circuit thus ultimately concluded that respondent "requested different relief," and that Section 1500 was inapplicable, because respondent's "complaint in the district court requests only equitable [monetary] relief and not damages while [its] complaint in the [CFC] requests only damages and not equitable relief." *Ibid.*

Moreover, even if respondent were correct (Opp. 23-27) that the panel majority relied on the notion that respondent's CFC and district court complaints did not seek "overlapping" monetary relief, that analysis would

be flawed in its own right.[1] The judicial relief that is available on a claim in both the CFC and the district court is the "relief to which [the] party is entitled, even if the party has not demanded that relief in its [complaint]." Fed. R. Civ. P. 54(c) (adopted 1937); see CFC R. 54(c) (same text). A court therefore may grant legal damages even if a complaint seeks only equitable relief (and vice versa), and may award a quantum of monetary relief greater than that requested in the pleadings; except for default judgments, the proof adduced in litigation rather than the pleadings determines the relief available. See 10 James Wm. Moore et al., *Moore's Federal Practice* § 54.72[1][a]-[c] (3d ed. 2009) (citing cases). Rule 54(c) thus highlights the folly of hinging Section 1500's jurisdictional restrictions on the relief identified in a plaintiff's complaints. The Federal Circuit's approach encourages strategic manipulation of the pleading process to circumvent the Section 1500 bar when, at the end of the day, the details of a plaintiff's demand for relief would not restrict the relief ultimately available in either the CFC or the district court.

Respondent recognizes that the accounting it requested in district court may also be provided in its CFC action, but echos the Federal Circuit's rationale that "it is [only] the relief the plaintiff '*requests*' that matters under § 1500." Opp. 27; cf. Pet. 24-25. Nothing in Section 1500's text suggests that odd result, which would allow simultaneous suits potentially leading to the same relief based on a party's artfully crafted "requests" in its

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[1] As both the dissenting judge and the CFC explain, respondent's overlapping requests for relief are apparent from its pleadings. Pet. App. 23a 25a, 32a 39a, 42a, 49a-54a; see Pet. 6-9 (complaints seek "profits" that allegedly would have resulted from proper "invest[ment]" and funds allegedly not deposited into respondent's accounts).

complaints. That outcome illustrates how misguided the Federal Circuit's "same relief" inquiry has become, inviting the development of intricate pleading distinctions to facilitate the duplicative litigation that Section 1500 was intended to foreclose.

c. The Federal Circuit reached that result in part by disregarding established interpretive principles governing jurisdictional restrictions and waivers of sovereign immunity. Pet. 25-29. Despite *Keene*'s admonition that Section 1500's jurisdictional limits "must be neither disregarded nor evaded," 508 U.S. at 207 (citation omitted), the court of appeals justified its narrow interpretation of Section 1500 on the ground that its own prior decisions had reduced Section 1500's requirements to a purposeless "jurisdictional dance." Pet. App. 17a. And rather than strictly construing the scope of Congress's waiver of sovereign immunity in light of Section 1500's limitation, the court relied on its own policy judgment that suits against the sovereign advance the public interest. Pet. 28-29. The Federal Circuit's reasoning in this regard—as well as its associated rejection of the government's arguments concerning the proper scope of Section 1500 as "hollow" and of "no real consequence"—was no mere dicta (Opp. 30), but a necessary component of the court's decision. Pet. 25-27 & n.5.

Respondent's defense of the Federal Circuit's rationale underscores the court's errors. Rather than defend the court's order-of-filing rule as correct (it is not, Pet. 26-27), respondent simply asserts (Opp. 29-30) that the rule reflects "settled precedent." That assertion is wrong for the same reasons as the contention that *Casman* is "settled law." See pp. 3-4, *supra*; cf. *Keene*, 508 U.S. at 209 n.4, 215-216 (reserving judgment on the then-repudiated order-of-filing rule established by

Tecon Engineers, Inc. v. *United States*, 343 F.2d 943 (Ct. Cl. 1965), cert. denied, 382 U.S. 976 (1966)).

Respondent's statement (Opp. 31) that sovereign immunity canons are inapplicable because Section 1500 does not itself waive sovereign immunity is equally flawed. Since 1868, Section 1500 and its predecessors have confined the statutory waivers of sovereign immunity that confer jurisdiction on the CFC. As a limitation on the government's consent to be sued, Section 1500 must be strictly construed in favor of immunity. Pet. 3, 29.

3. Finally, respondent is mistaken in its contention that review is unwarranted because the question presented is "of limited applicability" (Opp. 32-33) and because this case is not a good vehicle for resolving the question (Opp. 22-23). The numerous decisions construing Section 1500 and its predecessors, including this Court's decision in *Keene*, reflect the many circumstances that trigger Section 1500's bar to duplicative litigation against the United States. Respondent acknowledges that the issue has arisen in numerous cases after *Keene*, including more than 30 pairs of Indian tribal trust cases currently pending in the CFC and district court. Opp. 6 n.2, 32. Respondent's own suits are based on allegations concerning government conduct spanning more than 100 years. Pet. App. 60a-63a, 65a-67a, 76a, 81a-83a. The prospect of such sprawling litigation in two courts simultaneously illustrates why Congress prohibited duplicative litigation in the CFC when the plaintiff has a suit pending in another court arising from the same operative facts.

Respondent further errs in suggesting (Opp. 22) that this case is a poor vehicle to resolve the question because the government did not ask the Federal Circuit to

overrule *Casman*. The en banc court in *Loveladies Harbor, Inc.* v. *United States*, 27 F.3d 1545, 1549 (Fed. Cir. 1994), rejected the government's argument for abandoning *Casman*, and, in this case, the government argued to the en banc court that *Casman* and *Loveladies* were wrongly decided. C.A. Pet. for Reh'g 8. Nothing more was required.[2]

Equally meritless is respondent's assertion (Opp. 23) that review is unwarranted because the Federal Circuit could have reversed the CFC on the ground that respondent's two suits do not involve the "same operative facts." The panel majority assumed *arguendo* that respondent's suits involve the "same operative facts" by declining to resolve the question and basing its holding on independent grounds. Pet. App. 9a n.1. And respondent does not now adequately develop the contrary position, which the panel's dissenting member and the CFC correctly rejected. See *id.* at 20a-21a, 48a-49a.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ELENA KAGAN
Solicitor General

APRIL 2010

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[2] The government also argued that it could prevail without overruling those decisions because respondent's suits did not involve "completely different" relief. C.A. Pet. for Reh'g 9-10.

PETITIONER'S BRIEF

Supreme Court, U.S.
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No. 09-846

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v.

TOHONO O'ODHAM NATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
IGNACIA S. MORENO
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANTHONY A. YANG
Assistant to the Solicitor General
AARON P. AVILA
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

HILARY C. TOMPKINS
Solicitor
Department of the Interior
Washington, D.C. 20460

421 59

QUESTION PRESENTED

Under 28 U.S.C. 1500, the Court of Federal Claims (CFC) does not have jurisdiction over "any claim for or in respect to which the plaintiff * * * has * * * any suit or process against the United States" or its agents "pending in any other court." The question presented is:

Whether 28 U.S.C. 1500 deprives the CFC of jurisdiction over a claim seeking monetary relief for the government's alleged violation of fiduciary obligations if the plaintiff has another suit pending in federal district court based on substantially the same operative facts, especially when the plaintiff seeks monetary relief or other overlapping relief in the two suits.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provision involved 2
Statement 2
Summary of argument 14
Argument:
I. Section 1500 precludes jurisdiction in the Court of Federal Claims whenever a plaintiff has a suit pending in another court based on substantially the same operative facts, even if the other suit seeks different relief 19
A. The plain text of Section 1500 precludes CFC jurisdiction whenever a plaintiff's other suit or process arises from substantially the same operative facts 20
B. The Federal Circuit's interpretation of Section 1500 is not justified by the statute's text, this Court's decisions, or the Federal Circuit's own policy views 31
1. The Federal Circuit erred in relying on *Casman*'s reading of Section 1500 31
2. The Federal Circuit's policy analysis does not justify its restrictive reading of Section 1500 35
II. The Tribe did not seek "different relief" in district court because both cases sought monetary relief and other overlapping relief 43
Conclusion 49

TABLE OF AUTHORITIES

Cases: Page

Ali v. *Federal Bureau of Prisons*, 552 U.S. 214 (2008) ... 22
Baltimore & Ohio R.R. v. *O'Donnell*, 32 N.E. 476 (Ohio 1892) ... 30
Boyle v. *United States*, 129 S. Ct. 2237 (2009) ... 22
Beers v. *Arkansas*, 61 U.S. (20 How.) 527 (1858) ... 2
Bynum's Case, 8 Ct. Cl. 440 (Dec. Term 1872) ... 29
Casman v. *United States*, 135 Ct. Cl. 647 (1956) ... 6, 16, 31, 32, 33, 43
Cohens v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821) ... 2
Coolidge v. *Guthrie*, 6 F. Cas. 461 (C.C.S.D. Ohio 1868) ... 30
Corona Coal Co. v. *United States*, 263 U.S. 537 (1924) ... 5, 34, 38
Department of the Army v. *Blue Fox, Inc.*, 525 U.S. 255 (1999) ... 23, 25, 41
Finley v. *United States*, 490 U.S. 545 (1989) ... 37, 39
Fourco Glass Co. v. *Transmirra Prods. Corp.*, 353 U.S. 222 (1957) ... 38
Glidden Co. v. *Zdanok*, 370 U.S. 530 (1962) ... 2
Heckler v. *Edwards*, 465 U.S. 870 (1984) ... 45
Hertz Corp. v. *Friend*, 130 S. Ct. 1181 (2010) ... 46
Hobbs v. *United States*, 168 Ct. Cl. 646 (1964) ... 38
Intermingled Cotton Cases, 92 U.S. 651 (1876) ... 29, 30
Keene Corp. v. *United States*, 508 U.S. 200 (1993) ... *passim*
Kentucky v. *Graham*, 473 U.S. 159 (1985) ... 23
Kosak v. *United States*, 465 U.S. 848 (1984) ... 14, 22

Cases—Continued: Page

Lane v. *Pena*, 518 U.S. 187 (1996) 25, 26
Lapides v. *Board of Regents of Univ. Sys.*, 535 U.S. 613 (2002) 45
Lehman v. *Nakshian*, 453 U.S. 156 (1981) 25, 40
Library of Cong. v. *Shaw*, 478 U.S. 310 (1986) 41
Loveladies Harbor, Inc. v. *United States*, 27 F.3d 1545 (Fed. Cir. 1994) ..... *passim*
Maguire Indus., Inc. v. *United States*, 114 Ct. Cl. 687 (1949), cert. denied, 340 U.S. 809 (1950) 38
Matson Navigation Co. v. *United States*, 284 U.S. 352 (1932) 23
Mertens v. *Hewitt Assocs.*, 508 U.S. 248 (1993) 48
Mine Safety Appliances Co. v. *Forrestal*, 326 U.S. 371 (1945) 23
Newman-Green, Inc. v. *Alfonzo-Larrain*, 490 U.S. 826 (1989) 39
OPM v. *Richmond*, 496 U.S. 414 (1990) 26
Owen Equip. & Erection Co. v. *Kroger*, 437 U.S. 365 (1979) 37
Passamaquoddy Tribe v. *United States*, 82 Fed. Cl. 256 (2008) 39
Reeside v. *Walker*, 52 U.S. (11 How.) 272 (1851) 2, 27
Republic of Iraq v. *Beaty*, 129 S. Ct. 2183 (2009) 22
Ripley v. *Davis*, 15 Mich. 75 (1866) 30
Ruckelshaus v. *Sierra Club*, 463 U.S. 680 (1983) 25
Skinner & Eddy Corp., In re, 265 U.S. 86 (1924) 38
Smoot's Case, 82 U.S. (15 Wall.) 36 (1873) 5
Soriano v. *United States*, 352 U.S. 270 (1957) 25

Cases—Continued: Page

Spencer's Case, 8 Ct. Cl. 288 (Dec. Term 1872), aff'd, *sub nom. Spencer* v. *United States*, 91 U.S. 577 (1876) 29

Tecon Eng'rs, Inc. v. *United States*, 343 F.2d 943 (Ct. Cl. 1965), cert. denied, 382 U.S. 976 (1966) 6, 36

Tempel v. *United States*, 248 U.S. 121 (1918) 40

Thermtron Prods., Inc. v. *Hermansdorfer*, 423 U.S. 336 (1976) 39

UNR Indus., Inc. v. *United States*, 962 F.2d 1013 (Fed. Cir. 1992) 6, 31, 37, 39

Union Pac. R.R. v. *United States*, 313 U.S. 450 (1941) 22

United States v. *Atlantic Research Corp.*, 551 U.S. 128 (2007) 45

United States v. *Gonzales*, 520 U.S. 1 (1997) 22

United States v. *Idaho*, 508 U.S. 1 (1993) 26

United States v. *King*, 395 U.S. 1 (1969) 41

United States v. *Klein*, 80 U.S. (13 Wall.) 128 (1872) 29

United States v. *Mitchell*, 463 U.S. 206 (1983) 3, 4, 24, 27, 40

United States v. *Navajo Nation*, 129 S. Ct. 1547 (2009) 24, 40

United States v. *New York Rayon Importing Co.*, 329 U.S. 654 (1947) 25

United States v. *Nordic Vill., Inc.*, 503 U.S. 30 (1992) 25, 41

United States v. *Padelford*, 76 U.S. (9 Wall.) 531 (1870) 29, 30

Cases—Continued: Page

United States v. *Ross*, 92 U.S. 281 (1876) 30
United States v. *Sherwood*, 312 U.S. 584 (1941) 26
United States v. *Testan*, 424 U.S. 392 (1976) 25, 40
United States v. *Williams*, 514 U.S. 527, 531 (1995) 25
Whitfield v. *Whitfield*, 40 Miss. 352 (1866) 30
Williams v. *United States*, 289 U.S. 553 (1933) 2

Constitution, statutes and rules:

U.S. Const. Art. I, § 9, Cl. 7 (Appropriations Clause) 26
Abandoned Property Collection Act, ch. 120, 12 Stat 820 29
§§ 1-2, 12 Stat. 820 29
§ 3, 12 Stat. 820 29
Act of Feb. 24, 1855, ch. 122, 10 Stat. 612:
§ 1, 10 Stat. 612 27
§§ 7-9, 10 Stat. 613-614 27
Act of Mar. 3, 1863, ch. 92, §§ 2-3, 12 Stat. 765 27
Act of Mar. 17, 1866, ch. 19, § 1, 14 Stat. 9 27
Act of June 25, 1868, ch. 71, § 8, 15 Stat. 77 3
Act of June 25, 1948, ch. 646, 62 Stat. 869:
§ 1, 62 Stat. 942 4
§ 39, 62 Stat. 996 4
Act of Aug. 29, 1972, Pub. L. No. 92-415, § 1, 86 Stat. 652 33
Employee Retirement Income Security Act of 1974, 29 U.S.C. 1132(a)(5) 48
Indian Claims Commission Act, ch. 959, § 24, 60 Stat. 1055 4

Statutes and rules—Continued: Page

Indian Tucker Act, 28 U.S.C. 1505 4
Judicial Code, ch. 231, 36 Stat. 1087:
§ 154, 36 Stat. 1138 (28 U.S.C. 260 (1946)) 3, 38
§ 297, 36 Stat. 1168 4
Tucker Act, ch. 359, § 1, 24 Stat. 505 4
28 U.S.C. 1491(a)(1) 4
28 U.S.C. 1491(a)(2) 33
Rev. Stat. (1875):
§ 1067 3
§ 5596 4
5 U.S.C. 702 24
28 U.S.C. 1500 ..... *passim*
28 U.S.C. 2201 41
28 U.S.C. 2680(c) 22
Fed. Cl. R. 54(c) 18, 42
Fed. R. Civ. P.:
Rule 8(a)(3) 42
Rule 54(c) 18, 42

Miscellaneous:

Cong. Globe, 40th Cong., 2d Sess. (1868) 29
Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 Mich. L. Rev. 1207 (2009) 26
John F. Manning, *Clear Statement Rules and the Constitution*, 110 Colum. L. Rev. 399 (2010) 26
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Miscellaneous—Continued: Page

Restatement (Second) of Torts (1979) 45

S. Rep. No. 1066, 92d Cong., 2d Sess. (1972) 33

David Schwartz, *Section 1500 of the Judicial Code And Duplicate Suits Against the Government and its Agents*, 55 Geo. L.J. 573 (1967) 33

2 Joseph Story, *Commentaries on Equity Jurisprudence* (1918) 45

The Federalist No. 81 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961) 2

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Webster's New International Dictionary:

1st ed. 1917 21

2d ed. 1958 21

Webster's Third New International Dictionary (1966) 14, 21

Charles Alan Wright et al., *Federal Practice and Procedure* (1998) 42

In the Supreme Court of the United States

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 559 F.3d 1284. The opinion of the Court of Federal Claims (Pet. App. 27a-55a) is reported at 79 Fed. Cl. 645.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 2009. A petition for rehearing was denied on August 18, 2009 (Pet. App. 56a-57a). On November 9, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 16, 2009. On December 4, 2009, the Chief Justice further extended the time to January 15, 2010, and the petition was filed on that date. The petition for

a writ of certiorari was granted on April 19, 2010. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 1500 of Title 28 of the United States Code provides:

> The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

STATEMENT

1. a. It has long been an "established principle of jurisprudence in all civilized nations that the sovereign cannot be sued * * * without its consent" and that, when such consent is given, a suit against the sovereign must comply strictly with "the terms and conditions on which [the sovereign] consents to be sued." *Beers* v. *Arkansas*, 61 U.S. (20 How.) 527, 529 (1858); see, *e.g.*, *Reeside* v. *Walker*, 52 U.S. (11 How.) 272, 290-291 (1851); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 379-380 (1821) (Marshall, C.J.). That rule "that 'the sovereign power is immune from suit'" was "'well settled and understood' at the time of the Constitutional Convention." *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 562-564 (1962) (plurality opinion) (quoting *Williams* v. *United States*, 289 U.S. 553, 573 (1933), and citing *The Federalist No. 81*, at 511 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961)). Because of that immunity, "the only

recourse available to private claimants" with claims against the United States before 1855 was normally "to petition Congress for relief" in the form of a private bill. *United States* v. *Mitchell*, 463 U.S. 206, 212-213 (1983).

In 1855, Congress created the Court of Claims with limited authority to hear claims against the United States, report its findings to Congress, and, where appropriate, recommend enactment of a private bill to provide the claimant with monetary relief. *Mitchell*, 463 U.S. at 212-213. That limited authority did not sufficiently relieve Congress of the burdens of considering private bills. *Id.* at 213. Accordingly, in 1863, Congress adopted President Lincoln's recommendation to authorize the Court of Claims to issue final judgments. *Ibid.* In 1866, Congress enabled the Court of Claims to exercise full judicial power by repealing a provision that had allowed the Secretary of the Treasury to prevent complete execution of the court's judgments. *Id.* at 213 n.12.

Two years later, in 1868, Congress enacted the predecessor to 28 U.S.C. 1500. That provision prohibited the Court of Claims from exercising jurisdiction over "any claim * * * for or in respect to which" the plaintiff "has pending any suit or process in any other court" against an agent of the United States. See Act of June 25, 1868, ch. 71, § 8, 15 Stat. 77; see *Keene Corp.* v. *United States*, 508 U.S. 200, 205-207 (1993). Congress reenacted that jurisdiction-limiting statute in 1874 as Section 1067 of the Revised Statutes and in 1911 as Section 154 of the Judicial Code, ch. 231, § 154, 36 Stat. 1138 (28 U.S.C. 260 (1946)). See *Keene*, 508 U.S. at 206-207. In 1948, when Congress again reenacted the statute and moved it to its current location at 28 U.S.C. 1500, Congress expanded the statute's scope to preclude Court of Claims jurisdiction if the plaintiff's related suit in the

other court is "against the United States" or against an agent of the United States. See Act of June 25, 1948, ch. 646, § 1, 62 Stat. 942; *Keene*, 508 U.S. at 211 n.5.[1]

Congress has enacted every modern-day statute conferring jurisdiction on the Court of Claims and its trial-court successor, the United States Court of Federal Claims (CFC), against the backdrop of the jurisdictional limitation now embodied in Section 1500.[2] Of particular relevance here, Congress enacted the Tucker Act, 28 U.S.C. 1491(a)(1), and the Indian Tucker Act, 28 U.S.C. 1505—on which respondent rests CFC jurisdiction in this case (Pet. App. 60a)—with that statutory jurisdictional limit firmly entrenched in federal law. See Tucker Act, ch. 359, § 1, 24 Stat. 505 (enacted 1887); Indian Claims Commission Act, ch. 959, § 24, 60 Stat. 1055 (enacted 1946).

b. Section 1500 provides that the CFC shall not have jurisdiction of "any claim for or in respect to which" the plaintiff has "any suit or process" against the United States or an agent thereof "pending in any other court." 28 U.S.C. 1500. In *Keene*, this Court explained that Section 1500 "requires a comparison between the claims raised in the [CFC] and in the other lawsuit." 508 U.S. at 210. The Court also reasoned that Congress's use of the disjunctive "or" in the phrase "for or in respect to which" demonstrates that Section 1500 bars CFC juris-

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[1] Congress repealed the prior version of the statute with each reenactment. See Act of June 25, 1948, ch. 646, § 39, 62 Stat. 996; Judicial Code, ch. 231, § 297, 36 Stat. 1168; Rev. Stat. § 5596 (1875).

[2] In 1982, Congress transferred the appellate and trial functions of the Court of Claims to the Court of Appeals for the Federal Circuit and the United States Claims Court, respectively. In 1992, the Claims Court was renamed the CFC. See *Keene*, 508 U.S. at 202 n.1; *Mitchell*, 463 U.S. at 228 n.33.

diction "not only as to claims 'for . . . which' the plaintiff has sued in another court," but also "as to those [CFC claims] 'in respect to which' he has sued elsewhere." *Id.* at 213. The latter restriction, *Keene* concluded, "make[s] it clear that Congress did not intend the statute to be rendered useless by a narrow concept of identity" of the CFC claim and the other suit, which would mistakenly allow a "liberal opportunity to maintain two suits arising from the same factual foundation." *Ibid.*

Keene ultimately held that Section 1500 requires dismissal of a CFC claim when "the plaintiff's other suit [is] based on substantially the same operative facts as the [CFC] action," "at least" if there is "some overlap in the relief requested." 508 U.S. at 212. Dismissal is required, the Court held, even if the other action is "based on [a] different legal theor[y]" that could not "have been pleaded" in the CFC. *Id.* at 212-214. Although the Court observed in *Keene* that Section 1500 has been criticized as "anachronistic" and acknowledged that Section 1500's jurisdictional restrictions may "deprive plaintiffs of an opportunity to assert rights," the Court stressed that the courts "enjoy no 'liberty to add an exception . . . to remove apparent hardship.'" *Id.* at 217-218 (quoting *Corona Coal Co.* v. *United States*, 263 U.S. 537, 540 (1924)). Such concerns, the Court explained, must be directed to "Congress, for [it is] that branch of the government" that has "the constitutional authority to define the jurisdiction of the lower federal courts" and that has "limited the jurisdiction of the Court of Claims" by enacting Section 1500. *Id.* at 207, 217-218 & n.14 (quoting *Smoot's Case*, 82 U.S. (15 Wall.) 36, 45 (1873)).

Keene reserved two questions concerning "judicially created exceptions" to Section 1500 that are relevant

to this case. See *Keene*, 508 U.S. at 216 (quoting *UNR Indus., Inc.* v. *United States*, 962 F.2d 1013, 1021 (Fed. Cir. 1992) (en banc), aff'd *sub nom. Keene*, *supra*). Specifically, the Court reserved decision on whether an exception to Section 1500's bar might properly be fashioned to allow two suits based on "substantially the same operative facts" (*id.* at 212) to proceed when a plaintiff either (1) seeks "completely different relief" in the CFC and the other court, *id.* at 212 n.6, 214 n.9, 216 (discussing *Casman* v. *United States*, 135 Ct. Cl. 647 (1956)), or (2) files his CFC claim first, before filing the related suit in another court. *Id.* at 209 n.4, 216 (discussing *Tecon Eng'rs, Inc.* v. *United States*, 343 F.2d 943 (Ct. Cl. 1965), cert. denied, 382 U.S. 976 (1966) (*Tecon*)). The Federal Circuit had rejected both of those judicially created exceptions in the en banc decision that was reviewed by this Court in *Keene*, see *UNR Indus.*, 962 F.2d at 1020, 1024-1025 (declaring *Casman* overruled); *id.* at 1020, 1023 (declaring *Tecon* overruled), but the Federal Circuit has since stated that the pertinent portions of *UNR Industries* were non-binding dicta, and that the exceptions recognized in *Casman* and *Tecon* remain good law. See *Loveladies Harbor, Inc.* v. *United States*, 27 F.3d 1545, 1549, 1551 (1994) (en banc) (*Loveladies*) (discussing *Casman*); Pet. App. 16a-17a (discussing *Tecon*).

2. On December 28, 2006, the Tohono O'odham Nation (Tribe) filed a complaint against the United States in the District Court for the District of Columbia. Pet. App. 74a-93a. Just one day later, it filed a similar complaint against the United States in the CFC. *Id.* at 58a-73a.

a. The Tribe's district court complaint initiated "an action to seek redress of breaches of trust by the United

States * * * in the management and accounting of [the Tribe's] trust assets." Pet. App. 74a-75a. The complaint states that those assets include the Tribe's reservation lands, mineral resources, and associated income held for it in trust by the United States, as well as funds owed by the United States to the Tribe pursuant to court judgments. *Id.* at 75a-76a, 79a-80a. The complaint asserts that the United States owes "fiduciary obligations to the [Tribe] with respect to the management and administration of the [Tribe's] trust funds and other trust assets" that are "rooted in and derive from numerous statutes and regulations." *Id.* at 79a, 81a (citing illustrative provisions). "The statutes, regulations, and executive orders giving rise to the United States' fiduciary duties," it asserts, "provide the 'general contours' of those duties" and "specific details are filled in through reference to general trust law." *Id.* at 82a (citation omitted).

More specifically, the district court complaint alleges that the government, *inter alia*, failed "to provide an adequate accounting of the trust assets" and failed both to "collect" and to "invest" trust funds "in compliance with [its] fiduciary responsibilities and other federal statutory and regulatory law." Pet. App. 76a. It alleges numerous "breaches of trust [that] include, but are not limited to," the failure to preserve records and provide a proper "accounting of trust property" and failures to "deposit trust funds," take reasonable steps "to preserve and protect trust property," and "refrain from self-dealing." *Id.* at 83a-84a. The complaint further alleges that the government breached a duty to manage the property held in trust "to produce a maximum return to the [Tribe]" by "invest[ing]" such funds properly and "maximiz[ing] profits" therefrom. *Id.* at 76a, 84a; see

id. at 83a (duty to "invest" and "maximize" assets); *id.* at 86a (statutory investment duty).

Based on those factual allegations, Count 1 of the district court complaint asserts that the government has "failed to fulfill [its] fiduciary obligations," which include, "*inter alia*," the duty to provide a proper "accounting of the [Tribe's] trust assets." Pet. App. 89a-90a. Count 1 also requests a declaration that both defines "the [government's] fiduciary duties" and finds them to have been breached. *Ibid.* Count 2 asserts a "continuing pattern" of breaches of "fiduciary duties" and seeks an injunction directing both the completion of a proper accounting and compliance with "all other fiduciary duties." *Id.* at 91a. Count 2 thus requests a "complete accounting" that is "not limited to" the "funds under the custody and control of the United States," and adds that, based on the results of that "complete accounting," the Tribe seeks "restatement of [its] trust fund account balances" and "any additional equitable relief," such as "disgorgement" and "equitable restitution," that "may be appropriate." *Ibid.*; see *id.* at 92a. Finally, the Tribe's prayer for relief in district court restates the relief requested in Counts 1 and 2 and adds a general plea "[f]or such other and further relief as the Court, * * * sitting in equity, may deem just and proper." *Id.* at 91a-93a.

b. The Tribe's CFC complaint closely parallels the Tribe's district court complaint. The CFC complaint states that it asserts "an action for money damages against the United States" for alleged "mismanagement of the [Tribe's] trust property" through "breaches of statutory, regulatory, and fiduciary duties owed to the [Tribe]." Pet. App. 58a-59a. The complaint specifies that the asserted duties pertain to the Tribe's reserva-

tion lands, mineral resources, and associated income held by the United States, as well as funds owed to the Tribe by the United States under court judgments. *Id.* at 60a-62a. The complaint, like its district court counterpart, asserts that the government owes "fiduciary obligations" to the Tribe with respect to its "management and control of the [Tribe's] tribal assets" that are "rooted in and derive from a number of statutes, regulations and executive orders." *Id.* at 62a-63a (citing illustrative provisions). "The statutes, regulations, and executive orders giving rise to the United States' fiduciary duties," it adds, "provide the 'general contours' of those duties," and "the details are filled in through reference to general trust law." *Id.* at 64a (citation omitted).

Like the district court complaint, the CFC complaint alleges several "fiduciary duties" and breaches by the government, including the failure to "[f]urnish complete and accurate information to the [Tribe] as to the nature and amount of trust assets" by "performing a [proper] accounting of all the trust property." Pet. App. 65a-66a (¶¶ 22.d, 23.d). It further alleges breaches of duties to keep "accurate information," "properly administer the trust," "collect and deposit the trust funds," "preserve the trust assets," and "refrain from self-dealing." *Id.* at 66a-67a. And, like the district court complaint, it alleges the breach of a duty to "invest" funds held by the government in trust "to maximize [its] productivity" for the Tribe. *Id.* at 67a; see *id.* at 70a-72a.

Counts 1 through 3 each invoke the government's alleged failure to perform a proper accounting, and assert that the Tribe was damaged by the government's alleged failure to properly manage the Tribe's mineral estate (Count 1), non-mineral estate (Count 2), and judgment funds (Count 3). Pet. App. 67a-71a. Those breach-

es allegedly include failures, *inter alia*, "to collect" appropriate compensation for leased lands and property rights, "to lease" such assets at fair market value, and "to invest" properly the Tribe's "judgment funds" and other "trust funds." *Ibid.* Count 4 asserts injury caused by alleged governmental failures to properly invest tribal trust funds. *Id.* at 71a-72a. The complaint's prayer for relief seeks, *inter alia*, damages for the government's "breaches of fiduciary duty" and "such other and further relief as the Court deems just and appropriate." *Id.* at 72a-73a.

3. The CFC granted the government's motion to dismiss, holding that it lacked jurisdiction under Section 1500. Pet. App. 27a-55a.

After comparing the district court and CFC complaints with a side-by-side table detailing their allegations, Pet. App. 33a-38a, the court explained that the "complaints clearly involve the same parties, the same trust corpus, the same asserted trust obligations, and the same asserted breaches of trust over the same period of time." *Id.* at 39a. The CFC added that, although the district court complaint has an "apparent emphasis" on an accounting, it also seeks equitable monetary relief in the form of a restatement of accounts, disgorgement, and restitution. *Id.* at 39a, 42a. The CFC complaint, in turn, "although focusing on money damages," seeks relief that "will require an accounting [by the government] in aid of judgment." *Id.* at 39a, 41a, 55a. And, in both cases, the court explained, "[t]he underlying facts are the same" for "all practical purposes." *Id.* at 48a-49a. In these circumstances, the court found it "obvious that there is virtually 100 percent overlap" between the two cases. *Id.* at 49a. The court accordingly held that, given the "substantial overlap in the operative facts" and "in

the relief requested," Section 1500 required dismissal without prejudice for want of jurisdiction. *Id.* at 55a.

In so holding, the court rejected the Tribe's contention that Section 1500 was inapplicable because the Tribe's request for equitable monetary relief in district court was "different" from its request for damages in the CFC. Pet. App. 49a-54a. The CFC explained that a plaintiff's "legal theory" is immaterial under Section 1500 and, in any event, an Indian breach-of-trust claim in the CFC is in substance "an equitable proceeding that produces a monetary remedy." *Id.* at 49a-50a, 53a-54a. What is "relevant" in this context, the CFC held, "is the form of relief"—that is, "money." *Id.* at 54a.

4. A divided panel of the Federal Circuit reversed and remanded. Pet. App. 1a-26a.

a. The majority interpreted its post-*Keene* en banc decision in *Loveladies* as holding that Section 1500's jurisdictional bar applies only if the plaintiff's claim in the CFC both "ar[i]se[s] from the same operative facts" and "seek[s] the same relief" as a "claim pending in another court." Pet. App. 7a (quoting *Loveladies*, 27 F.3d at 1551) (emphasis omitted); see *id.* at 8a-9a. It accordingly concluded that Section 1500 "does not divest the [CFC] of jurisdiction" if the plaintiff's action in another court seeks "'different' relief," even though the cases may "arise from the same operative facts." *Ibid.* (quoting *Loveladies*, 27 F.3d at 1551). The majority then determined that "the 'same relief' prong is dispositive" in this case, and it therefore declined to decide whether the Tribe's suits "arise from the same operative facts." *Id.* at 9a & n.1.

The majority reasoned that the two suits do not seek the "same relief" because the Tribe's CFC complaint "seeks damages at law, not equitable relief," whereas its

district court complaint "requests only equitable relief and not damages." Pet. App. 11a-12a. Although the majority recognized that the "equitable" relief sought in district court would, if granted, award the Tribe "money * * * in the government's possession," *id.* at 13a, it found "[t]he [Tribe's] careful separation of equitable relief and money damages" to be "critical to the § 1500 analysis in this case." *Id.* at 12a.

The majority disagreed with the CFC's conclusion that the Tribe's two suits sought "overlapping relief" in two areas: "money and an accounting." Pet. App. 12a (quoting *id.* at 49a). First, the majority concluded that the actions do not seek overlapping monetary relief. *Id.* at 12a-15a. It reasoned that the Tribe's district court complaint seeks only what the court labeled "equitable 'old money' relief"—*i.e.*, "money that is already in the government's possession, but that erroneously does not appear in the [Tribe's] accounts" and "balance sheet[s]." *Id.* at 13a-14a. The majority concluded that the CFC complaint, in contrast, seeks money damages for what the court labeled "'new money' that the [Tribe] should have earned as profit but did not" because the United States allegedly "fail[ed] to properly manage the [Tribe's] assets to obtain the maximum value." *Ibid.*

Second, the majority concluded that the complaints did not seek overlapping relief because the Tribe affirmatively "request[ed]" an "accounting" in district court but not in the CFC. Pet. App. 15a. The majority recognized that "what would ensue [in the CFC] would amount to an accounting" in aid of the CFC's ability to enter judgment, but it emphasized that the Tribe's "prayer for relief" in its CFC complaint does not expressly "request an accounting." *Ibid.* (quoting *id.* at 41a).

Finally, the majority rejected the argument that its ruling would undermine Section 1500's policy and purpose of relieving the United States from the burden of defending parallel suits in different courts. Pet. App. 15a. It concluded that such arguments "ring[] hollow" because, under Federal Circuit precedent, Section 1500 "does not actually prevent a plaintiff from filing two actions seeking the same relief for the same claims." *Id.* at 16a-17a. The majority stated that court of appeals had "overruled *Tecon*" in *UNR Industries* but, after *Keene*, had recognized that "*Tecon* is still good law." *Id.* at 16a. And under *Tecon*'s order-of-filing rule, Section 1500 only prohibits plaintiffs from filing a district court action before a CFC suit, while permitting plaintiffs to proceed simultaneously with both suits so long as the CFC action is filed first. *Id.* at 16a-17a. On that view, the majority concluded that Section 1500 "functions as nothing more than a 'jurisdictional dance,'" and it accordingly "found [no] purpose that § 1500 serves today." *Id.* at 17a (quoting *Loveladies*, 27 F.3d at 1549). The majority also expressed the view that it would not be "sound policy" to read Section 1500 to preclude damage actions in the CFC when plaintiffs challenge the same governmental action in other courts, because "[t]he nation is served by private litigation which accomplishes public ends" and "relies in significant degree on litigation to control the excesses [of] Government." *Ibid.* (quoting *Loveladies*, 27 F.3d at 1555-1556).

b. Judge Moore, in dissent, explained that the Tribe's suits "were based on substantially the same operative facts and that the two complaints included some overlap in the relief requested." Pet. App. 19a-20a. She accordingly concluded that this Court's decision in

Keene required that the CFC action be dismissed under Section 1500. *Ibid.*

SUMMARY OF ARGUMENT

For more than 140 years, Congress has ensured that plaintiffs cannot simultaneously pursue related actions in the Court of Claims (now the CFC) and the district court. The Federal Circuit erred in holding that Section 1500 permits the Tribe to bring such suits against the United States when its CFC claims and other suit arise from substantially the same operative facts. The court of appeals reasoned that a plaintiff may avoid Section 1500's jurisdictional bar by styling its complaints to avoid seeking the "same relief," and that, in this case, the Tribe may pursue its two suits against the government because it requested *legal* monetary relief in the CFC and *equitable* monetary relief in district court. Those holdings fundamentally misconstrue Section 1500's text and reflect an interpretive approach inconsistent with the teachings of this Court.

1. a. The plain text of Section 1500 prohibits CFC jurisdiction over "any" claim "for or in respect to which" the plaintiff has "any" pending suit or process in another court against either the United States or an agent thereof. 28 U.S.C. 1500. That broad language applies not only when the plaintiff's other suit is a suit "for" the CFC claim but also when it is a suit "in respect to" that claim. That latter phrase and this Court's decisions construing similar language demonstrate that Section 1500 applies when any suit brought by the plaintiff in another court "relat[es] to," is "concern[ed] with," has some "relation or reference to," *Webster's Third New International Dictionary* 1934 (1966), or is otherwise "associated in any way" to, *Kosak* v. *United States*, 465 U.S.

848, 854 (1984), the plaintiff's claim in the CFC. Even if it seeks different relief, a pending suit based on "substantially the same operative facts," *Keene Corp.* v. *United States*, 508 U.S. 200, 212 (1993), qualifies as such a related suit precluding CFC jurisdiction. Congress's direction that "any" such suit will trigger Section 1500's bar confirms that the statute does not depend on whether the related suit seeks the "same relief" as the claim in the CFC. Congress also expressly prohibited CFC jurisdiction when the plaintiff has a pending suit in another court against an individual government agent; by its very nature, such a suit against an individual involves distinctly different relief than a CFC claim against the United States.

Even if the text of Section 1500 were ambiguous, its restriction on the scope of Congress's waiver of sovereign immunity from suit in the CFC must be construed strictly to preserve immunity in this context. It is well established that the scope of a waiver of sovereign immunity, including the limitations and conditions on which Congress consents to suit, must be unequivocally expressed in statutory text and strictly construed in favor of the sovereign. Nothing in Section 1500 speaks to the "relief" sought by a plaintiff, and no text suggests that Section 1500's jurisdictional bar applies only when the plaintiff's CFC claim and other suit seeks the "same relief." The Federal Circuit's adoption of its same-relief requirement thus impermissibly expands, rather than strictly construes, the scope of Congress's waiver of immunity from suit.

That error is particularly significant in light of Section 1500's origin. The statute's restrictions date to 1868 and represent an important limit on the scope of the waivers of sovereign immunity through which Congress

gave the Court of Claims (now the CFC) authority to enter final judgment on claims that could previously be resolved only by Congress through private bills. The Federal Circuit's failure to strictly construe the scope of Congress's consent to suit in this context is unfaithful to the very sovereign-immunity principles that gave birth to the Court of Claims. Moreover, Congress enacted Section 1500's predecessor in the aftermath of the Civil War to force owners of property seized during the war to elect between two different actions that themselves involved completely different relief. Limiting Section 1500's jurisdictional bar to circumstances where a plaintiff seeks the "same relief" in two courts thus would erroneously render the statute useless for the very purposes for which it was enacted.

b. The Federal Circuit's decision relies on the interpretation of Section 1500 in *Casman* v. *United States*, 135 Ct. Cl. 647 (1956), which the court of appeals had rejected before *Keene* but has now re-embraced. The court erred in returning to *Casman*'s analysis. *Casman* rests on the erroneous assertion that Section 1500 should not apply where a plaintiff is precluded from bringing a single suit for all forms of relief. That limitation finds no support in the statutory text, which does not mention "relief." Moreover, *Keene* held that Section 1500 bars jurisdiction where the plaintiff's other suit involves claims that could not have been "joined in a single suit" and is based on a cause of action that lies "beyond the jurisdiction of the [CFC]." 508 U.S. at 213-214 (citation omitted). Requiring a plaintiff to elect between a CFC claim and a factually related suit seeking different relief in another court is not materially different. Indeed, the Court in *Keene* recognized that Section 1500 may operate to deprive a plaintiff of the opportunity to

assert rights that Congress has generally made available, and it nevertheless concluded that only Congress, not the courts, has the authority to eliminate any resulting hardship.

The Federal Circuit concluded that Section 1500 no longer serves "any purpose" because, under its own interpretations, Section 1500 requires only a pointless "jurisdictional dance" that allows plaintiffs suing the federal sovereign to easily circumvent its restrictions. Pet. App. 17a (citation omitted). In so saying, the court of appeals got one thing right: Its post-*Keene* rulings have indeed reduced Section 1500 to an easily evaded, formal requirement. But that conclusion should have suggested to the Federal Circuit not that it disregard what it had left standing of Section 1500's jurisdictional restrictions, but that it revisit its own misguided interpretation of the statute.

The court of appeals strayed yet further from this Court's jurisprudence in declaring its view that it is "sound policy" to subject the government to suit in the CFC and, for that reason, it would demand a "clear expression" of Congress's intent to preserve sovereign immunity and limit CFC jurisdiction. Pet. App. 17a-18a (citation omitted). But it is well settled law that it is the elimination, not the preservation, of sovereign immunity that requires an unambiguous statutory command. And "policy concerns," no matter how compelling, are insufficient to waive that immunity.

2. Even if *Casman* had correctly held that a plaintiff may maintain two simultaneous suits against the United States if they seek "entirely different relief," the Tribe's requests for monetary relief in the CFC and the district court are not entirely different. The Federal Circuit believed that a distinction between the Tribe's request

for *legal* monetary relief in the CFC and *equitable* monetary relief in district court was "critical to the § 1500 analysis." Pet. App. 12a. That conclusion is both incorrect and inconsistent with *Keene*.

In *Keene*, this Court concluded that *Casman*'s exception to Section 1500's jurisdictional bar—under which prospective injunctive relief and retrospective monetary relief were deemed to be distinctly different—was inapplicable because Keene sought monetary relief in both the CFC and the district court. The same holds true here. Moreover, if the Federal Circuit's law-equity distinction were relevant to Section 1500, *Keene* would have had to address it, because the district court relief in that case was equitable monetary relief and the damages remedy in the CFC was legal. *Keene* did not do so because the law-equity distinction is irrelevant here.

The Federal Circuit's misguided approach led it into a thicket of elusive and technical distinctions that are in derogation of the principle that jurisdictional rules should be clear. Indeed, as this case vividly illustrates, the Federal Circuit's interpretation of Section 1500, if adopted by this Court, would encourage wasteful gamesmanship by litigants and the manipulation of the pleading process that, at the end of the day, will have no effect on the "relief" available to the plaintiff in its two simultaneous suits. See Fed. R. Civ. P. 54(c); Fed. Cl. R. 54(c).

ARGUMENT

I. SECTION 1500 PRECLUDES JURISDICTION IN THE COURT OF FEDERAL CLAIMS WHENEVER A PLAINTIFF HAS A SUIT PENDING IN ANOTHER COURT BASED ON SUBSTANTIALLY THE SAME OPERATIVE FACTS, EVEN IF THE OTHER SUIT SEEKS DIFFERENT RELIEF

Section 1500 deprives the CFC of jurisdiction over "any claim for or in respect to which" the plaintiff has "any suit or process" against the United States pending in any other court. The Federal Circuit's decision nevertheless held that Section 1500 permits a plaintiff to maintain simultaneous actions against the United States in two courts arising from substantially the same operative facts so long as the actions do not seek the "same relief." It further held that parallel requests for monetary relief are sufficiently "different" under that jurisdictional test if the monetary relief is deemed "legal" relief in one action and "equitable" relief in the other. The Federal Circuit's decision has no support in the broad text of Section 1500's prohibition on CFC jurisdiction; its reasoning disregards well-established principles for interpreting the scope of waivers of sovereign immunity from suit; its conclusions are inconsistent with this Court's interpretation of Section 1500 in *Keene Corp.* v. *United States*, 508 U.S. 200 (1993); and it resolves incorrectly important questions on which *Keene* reserved decision. Properly construed, Section 1500 prohibits a plaintiff from pursuing simultaneous actions against the United States in two courts based on the same factual foundation, regardless of the relief that the plaintiff seeks.

A. The Plain Text Of Section 1500 Precludes CFC Jurisdiction Whenever A Plaintiff's Other Suit Or Process Arises From Substantially The Same Operative Facts

Congress has broadly proscribed CFC jurisdiction over any claim against the United States for which the plaintiff has a related suit pending against the government in another court. This Court in *Keene* determined that that longstanding jurisdictional bar in Section 1500 precludes CFC jurisdiction when "the plaintiff's other suit [is] based on substantially the same operative facts as the [CFC] action" and reserved decision on whether "some overlap in the relief requested" is also necessary to trigger that jurisdictional bar. 508 U.S. at 212 & n.6. The text of Section 1500, which defines the scope of the sovereign's consent to suit, and the statute's historical context demonstrate that Congress barred CFC jurisdiction whenever a plaintiff has a related suit against the United States or a government agent in another court arising from substantially the same factual foundation. The relief sought by the plaintiff is irrelevant to Congress's flat prohibition.

1. Section 1500 bars CFC jurisdiction over "any claim for or in respect to which the plaintiff * * * has pending * * * any suit or process" against the United States or an agent thereof "in any other court." 28 U.S.C. 1500. This statutory text employs the word "which" to refer to the plaintiff's CFC claim. Section 1500's jurisdictional bar therefore is triggered when a plaintiff pursues "any suit or process" "for or in respect to" the CFC claim, when its suit or process is pending in another court against the United States or an agent thereof. This Court in *Keene* found it significant that Section 1500 prohibits CFC jurisdiction "not only as to claims 'for . . . which' the plaintiff has sued in another

court," but also "as to those 'in respect to which' he has sued elsewhere." *Keene*, 508 U.S. at 213. Section 1500 thus does more than simply preclude CFC jurisdiction where the plaintiff has another suit "for" the same claim asserted in the CFC. It bars CFC jurisdiction where the plaintiff's two suits involve *different* claims, so long the suit in the other court is a suit "in respect to" the plaintiff's claim in the CFC.

The expansive phrase "in respect to" reflects Congress's judgment to deprive plaintiffs of a "liberal opportunity to maintain two suits arising from the same factual foundation." *Keene*, 508 U.S. at 213. A suit in another court is a suit "in respect to" a claim in the CFC if it "relat[es] to," is "concern[ed] with," or has some "relation or reference to" the CFC claim. *Webster's Third New International Dictionary* 1934 (1966) (defining "respect" and "in respect to").[3] A suit in another court that arises from substantially the same operative facts as a claim in the CFC qualifies as a suit that "relates to," is "concerned with," or has some "relation or reference to" that claim because their shared factual foundation establishes that relationship. That conclusion is confirmed by this Court's determination that "the plain language" of a similar statutory phrase ("arising in respect of") is "encompassing" and "sweep[s] within" its scope all related matters "associated in any way."

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[3] Accord *Webster's New International Dictionary* 2122-2123 (2d ed. 1958) ("respect" means "[r]elation; relationship; reference; [or] regard" and is used "chiefly in phrases" such as "in respect to," which means "[i]n relation to; with regard to; as respects"); *Webster's New International Dictionary* 1816 (1st ed. 1917) (same); 2 Noah Webster, *An American Dictionary of the English Language* 56 (1828) (defining "respect" to mean "[r]elation, regard, reference; followed by *of*, but more properly by *to*").

Kosak v. *United States*, 465 U.S. 848, 854 (1984) (interpreting 28 U.S.C. 2680(c)); cf. *Union Pac. R.R.* v. *United States*, 313 U.S. 450, 464 (1941) (concluding that a statutory reference to concessions "in respect to" the transportation of property includes any concession that either "directly or indirectly" affects the cost of such transportation).

Congress further underscored Section 1500's breadth by emphasizing that its jurisdictional bar is triggered by "*any* suit or process." 28 U.S.C. 1500 (emphasis added). "The term 'any' ensures that the [phrase] has a wide reach," *Boyle* v. *United States*, 129 S. Ct. 2237, 2243 (2009), and Section 1500 thereby gives "no warrant to limit the class of" related suits that preclude CFC jurisdiction, *Republic of Iraq* v. *Beaty*, 129 S. Ct. 2183, 2189 (2009). See also *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 219 (2008) ("[T]he word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (quoting *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997)). Even if it does not seek the same relief, a suit that "aris[es] from the same factual foundation" as a claim in the CFC, *Keene*, 508 U.S. at 213, still qualifies as a suit that "relat[es] to," is "concern[ed] with," or has some "relation or reference to" that claim, *Webster's Third New International Dictionary* 1934, or as one that is "associated in any way" with the claim, *Kosak*, 465 U.S. at 854. The Federal Circuit's extratextual requirement that the plaintiff's other suit and CFC claim must seek the "same relief" to deprive the CFC of jurisdiction, Pet. App. 8a (citation omitted), therefore ignores the expansive language Congress employed in specifying that "any" related suit triggers the Section 1500 bar.

Congress's intent to foreclose CFC jurisdiction whenever a related suit is pending in another court, regardless of the relief sought, also follows directly from the types of actions to which Section 1500 expressly refers. Section 1500 applies when a CFC plaintiff has a related suit or process pending in another court "against" either "the United States" or "any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States." 28 U.S.C. 1500. Congress thus forced plaintiffs not only to choose between two different suits against the United States but to "elect[] between a suit in the Court of Claims [against the United States] and one brought in another court against an agent of the Government." *Matson Navigation Co.* v. *United States*, 284 U.S. 352, 356 (1932); see *Keene*, 508 U.S. at 211 n.5. That election required by statute by its very nature forces a choice between suits seeking different relief.

A suit against an individual agent yields fundamentally different relief than a suit against the United States, even when both suits pursue monetary claims. With a suit against an agent, the most that the plaintiff may obtain is a "victory against the individual defendant" that establishes the individual's liability to the plaintiff requiring a payment out of "personal assets." See *Kentucky* v. *Graham*, 473 U.S. 159, 166-167 (1985).[4]

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[4] Such personal-capacity suits are different from suits against federal officials in their official capacity. The latter are suits against the government, not the individual, and require a waiver of sovereign immunity. See *Graham*, 473 U.S. at 165-166 & n.11, 167-168; *Mine Safety Appliances Co.* v. *Forrestal*, 326 U.S. 371, 373-374 (1945); cf. *Depart-*

Such relief confers no rights enforceable against the United States. In contrast, when judgment is entered against the United States (pursuant to a waiver of sovereign immunity) the government is itself liable to pay the plaintiff from federal funds. That distinct remedy conferring distinct rights is not the "same relief" that could be sought by suing a government agent. And because Congress expressly barred CFC jurisdiction over actions against the United States when the plaintiff has also sued an agent of the United States, Section 1500 necessarily applies when the plaintiff's CFC claim and other suit seek different relief.

Indeed, Section 1500 applies even in cases in which the CFC plaintiff could never obtain *any* relief in the related suit pending in another court. Congress expressly barred CFC jurisdiction over a plaintiff's claim not only when the plaintiff itself has sued elsewhere but also when an "assignee" of the plaintiff has a related suit in another court. 28 U.S.C. 1500. Congress thereby precluded CFC jurisdiction even when the plaintiff is not itself a party in the related suit and, for that additional reason, Section 1500's application cannot properly turn on the "relief" sought by that plaintiff in the other suit.

2. Sovereign immunity principles confirm that interpretation. The Tucker Act and Indian Tucker Act are "jurisdictional provisions that operate to waive sovereign immunity for [certain] claims" brought against the United States in the CFC. *United States* v. *Navajo Nation*, 129 S. Ct. 1547, 1551 (2009); see *United States* v. *Mitchell*, 463 U.S. 206, 212 & n.8, 215 (1983); *United*

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ment of the Army v. *Blue Fox, Inc.*, 525 U.S. 255, 260-261 (1999) (discussing waiver of sovereign immunity in 5 U.S.C. 702, which applies to official-capacity suits).

States v. *Testan*, 424 U.S. 392, 398 (1976). Congress confined the scope of that consent to suit through Section 1500's express prohibition against CFC jurisdiction when the plaintiff has a related suit in another court. It is well settled that ambiguities concerning the scope of such consent must be strictly construed to preserve the United States' immunity from suit. Accordingly, even if the text of Section 1500 were ambiguous, it must be read to bar CFC jurisdiction when a plaintiff has a pending related suit in another court, even when those two actions seek different relief.

This Court has "frequently held" that a congressional waiver of sovereign immunity must be "'unequivocally expressed' in the statutory text" and "strictly construed, in terms of its scope." *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 261 (1999) (quoting *Lane* v. *Pena*, 518 U.S. 187, 192 (1996)); see, *e.g.*, *United States* v. *New York Rayon Importing Co.*, 329 U.S. 654, 659 (1947) ("The consent necessary to waive the traditional immunity must be express, and it must be strictly construed."). The Court has therefore concluded that statutory "ambiguities [must be construed] in favor of immunity," *United States* v. *Williams*, 514 U.S. 527, 531 (1995), to ensure that the "limitations and conditions upon which the Government consents to be sued [are] strictly observed," *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981) (quoting *Soriano* v. *United States*, 352 U.S. 270, 276 (1957)), and to guarantee that the requisite statutory consent is "not enlarge[d] . . . beyond what the language requires." *United States* v. *Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992) (quoting *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983)) (brackets in original; internal quotation marks omitted).

The canon of strict construction applies with special force when interpreting statutory waivers implicating monetary relief. A federal court's exercise of judicial authority "is limited by a valid reservation of congressional control over funds in the Treasury," *OPM* v. *Richmond*, 496 U.S. 414, 425 (1990), and Congress's exclusive authority to control federal expenditures "assure[s] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good" rather than "the individual pleas of litigants." *Id.* at 428; see U.S. Const. Art. I, § 9, Cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").[b] Narrowly construing statutory waivers of immunity protects that separation of powers by treating Congress's consent to sue "with that conservatism which is appropriate," *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941), to ensure that courts do not stray beyond the authority that the Legislature has affirmatively conferred. Courts thus must be "particularly alert to require a specific waiver of sovereign immunity before the United States may be held liable for" "monetary exactions." *United States* v. *Idaho*, 508 U.S. 1, 8-9 (1993); see *Lane*, 518 U.S. at 196 ("[W]hen it comes to an award of money damages, sovereign immunity places the Federal government on an entirely different footing than private parties.").

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[b] Cf. Paul F. Figley & Jay Tidmarsh, *The Appropriations Power and Sovereign Immunity*, 107 Mich. L. Rev. 1207, 1258-1264 (2009) (concluding that the Appropriations Clause provides a constitutional basis for federal sovereign immunity from damages claims); John F. Manning, *Clear Statement Rules and the Constitution*, 110 Colum. L. Rev. 399, 437 n.192 (2010) ("The most plausible textual source for federal sovereign immunity [from monetary claims] is the Appropriations Clause.").

The Court of Claims' role in the development of sovereign immunity jurisprudence highlights the central role of those principles here. "Before 1855 no general statute gave the consent of the United States to suit on claims for money damages," and claimants were forced to seek redress directly from Congress, which could exercise its authority over the federal fisc to grant monetary relief with private bills. *Mitchell*, 463 U.S. at 212-213; see *Reeside* v. *Walker*, 52 U.S. (11 How.) 272, 290-291 (1851) (explaining that sovereign immunity bars actions against the government to enforce debts and that, "under our political and fiscal system," Congress must exercise its appropriation power to pay such claims). In 1855, Congress created the Court of Claims, but its initial grant of authority was modest and simply authorized the court to examine claims and make recommendations to Congress concerning the enactment of private bills. See Act of Feb. 24, 1855, ch. 122, §§ 1, 7-9, 10 Stat. 612-614; *Mitchell*, 463 U.S. at 212-213. Only after a decade of experience with the court's handing of such claims did Congress, in 1866, confer full authority to issue final judgments against the United States on monetary claims founded on a federal statute, regulation, or government contract. See Act of Mar. 17, 1866, ch. 19, § 1, 14 Stat. 9; Act of Mar. 3, 1863, ch. 92, §§ 2-3, 12 Stat. 765; see also p. 3, *supra*. Two years after that innovation providing a limited waiver of sovereign immunity for certain categories of claims, Congress enacted Section 1500's predecessor. That provision has formed the backdrop for and restricted the scope of every modern-day waiver of sovereign immunity conferring jurisdiction on the CFC over monetary claims against the United States. Section 1500's jurisdictional limitation lies at the center of Congress's efforts to provide limited waiv-

ers of sovereign immunity for general categories of monetary claims, highlighting the need to accord it the construction appropriate to ensure that the scope of the waivers are strictly construed.

When strictly construed, the waiver of sovereign immunity that Congress limited with Section 1500 does not permit a plaintiff to pursue two related suits simultaneously even when they seek different relief. Nothing in the statutory text supports the Federal Circuit's "same relief" requirement (Pet. App. 8a-9a): Section 1500 itself makes no reference to the "relief" that a plaintiff may seek, and it contains no other text unambiguously requiring that the other suit and CFC claim seek the "same relief" to trigger the prohibition on simultaneously pursuing a CFC claim and a related suit against the government or its agents. Congress limited the scope of its consent to sue the United States in the CFC by specifying that the CFC shall have no jurisdiction over a claim when the plaintiff has another suit "in respect to" that claim; that broad text encompasses "any" related suit arising from the same factual foundation, see pp. 20-22, *supra*; and, at the very least, it does not provide an express and unequivocal consent to simultaneously maintain such parallel actions.

3. The Congress that enacted Section 1500's predecessor would have recognized that the statute precludes CFC jurisdiction even when a plaintiff's related suit in another court seeks completely different relief. Congress passed that provision in the wake of the Civil War to stop claimants whose property (typically cotton) had been seized by the federal government from pursuing two suits—one against the United States and the other against its agents—arising from the same factual foun-

dation. See *Keene*, 508 U.S. at 206, 213-214; see also Cong. Globe, 40th Cong., 2d Sess. 2769 (1868).

The claimants' suits against the United States in the Court of Claims were brought under the Abandoned Property Collection Act, ch. 120, 12 Stat 820, which specified that "all abandoned or captured property" seized by the government in insurrectionist areas could be either put to "public use" or forwarded for "sale [at auction] within the loyal states" with "the proceeds thereof * * * paid into the [United States] treasury." §§ 1-2, 12 Stat. 820; see *Keene*, 508 U.S. at 206. The act also authorized a property owner loyal to the Union to pursue a claim in the Court of Claims to collect "the residue of such proceeds," *i.e.*, the auction funds less "expenses" incurred by the government. § 3, 12 Stat. 820.

Congress thereby established a statutory "trust for the benefit" of such an owner, *Intermingled Cotton Cases*, 92 U.S. 651, 653 (1876), who could collect only the trust corpus formed from auction proceeds. See *United States* v. *Klein*, 80 U.S. (13 Wall.) 128, 138-139 (1872); *United States* v. *Padelford*, 76 U.S. (9 Wall.) 531, 543 (1870) (explaining that "the government is a trustee," which "hold[s] the proceeds of the petitioner's property for his benefit" and is "fully reimbursed for all expenses incurred"). That relief provided no compensation for government actions causing a reduction in (or the elimination of) the proceeds used to establish the trust or otherwise diminishing the funds actually deposited in the Treasury and held in trust for the claimant. See *Spencer's Case*, 8 Ct. Cl. 288, 292-294 (Dec. Term 1872) (no remedy for proceeds given by Treasury agent to persons not entitled to the funds because the funds were never deposited into the Treasury), aff'd *sub nom. Spencer* v. *United States*, 91 U.S. 577, 578 (1876); *By-*

num's Case, 8 Ct. Cl. 440, 442-444 (Dec. Term 1872) (no remedy for agent's unlawful charges reducing the amount deposited in the Treasury's "trust-fund"); see also *Intermingled Cotton Cases*, 92 U.S. at 653-654 (distributing only the sale proceeds "clearly traced into the treasury," with no remedy for the "portion of the cotton [that] was, after its capture, used for military purposes"); *United States* v. *Ross*, 92 U.S. 281, 282-283, 285 (1876) (rejecting claim of owner whose "cotton [was] captured" because he failed "to show that the United States is a trustee for him" by establishing a "connection between the cotton captured and the fund now held by the United States" after auction).

In contrast, the property claimants' "separate suits in other courts [sought] compensation * * * from federal officials * * * on tort theories such as conversion." *Keene*, 508 U.S. at 206. Such common-law suits, if successful, could recover as damages the full value of wrongfully seized property at the time of the alleged conversion. See *Ripley* v. *Davis*, 15 Mich. 75, 80 (1866); *Whitfield* v. *Whitfield*, 40 Miss: 352, 366 (1866); see also *Coolidge* v. *Guthrie*, 6 F. Cas. 461, 462 (C.C.S.D. Ohio 1868) (No. 3185) (tort suit against bona fide purchasor of seized cotton for the "full value" of the cotton); *Baltimore & Ohio R.R.* v. *O'Donnell*, 32 N.E. 476, 480 (Ohio 1892).

The trust-fund remedy that Congress established in the Court of Claims for a trust corpus held in the Treasury (minus costs incurred by the "government [as] trustee," *Padelford*, 76 U.S. (9 Wall.) at 543), is entirely different than the damages remedy at law available in common-law tort actions against government agents. The former was a special statutory proceeding to distribute a specific corpus (if any) held in trust, whereas

the latter involved a traditional action against an individual defendant providing full compensatory damages for tortious acts concerning the seizure of property. If Section 1500 were to be construed to apply only when the plaintiff's other suit and CFC claim seek the "same relief," it would impermissibly "render[] the statute useless, in all or nearly all instances, to effect the very object it was originally enacted to accomplish." *Keene*, 508 U.S. at 213-214.

B. The Federal Circuit's Interpretation Of Section 1500 Is Not Justified By The Statute's Text, This Court's Decisions, Or The Federal Circuit's Own Policy Views

The Federal Circuit's conclusion that Section 1500 precludes CFC jurisdiction only if the plaintiff's related suit in another court seeks the "same relief" as its claim in the CFC is based principally on the decision in *Casman* v. *United States*, 135 Ct. Cl. 647 (1956). The court of appeals' *Casman*-based holding is unwarranted by the statutory text, is contrary to this Court's decisions, and cannot be justified by the policy rationales asserted by the Federal Circuit.

1. The Federal Circuit erred in relying on Casman*'s reading of Section 1500*

The Federal Circuit's embrace of *Casman*'s understanding of Section 1500 lends no support to its judgment in this case. The en banc Federal Circuit had correctly repudiated *Casman* in *UNR Industries, Inc.* v. *United States*, 962 F.2d 1013, 1020, 1024-1025 (1992), aff'd on other grounds *sub nom. Keene, supra*. Cf. *Keene*, 508 U.S. at 215 (noting that the en banc court had "announced that it was overruling * * * *Casman*"). But one year after *Keene*, the divided court of appeals reinstated *Casman* and held that Section 1500's

jurisdictional bar applies only when the plaintiff's CFC claim and other suit arising from the same operative facts "seek *the same relief*." *Loveladies Harbor, Inc.* v. *United States*, 27 F.3d 1545, 1549, 1551 (Fed. Cir. 1994) (en banc). The Federal Circuit in this case followed that binding circuit precedent, Pet. App. 7a-8a; assumed *arguendo* that the CFC correctly held that the Tribe's CFC and district court complaints "arise from the same operative facts," *id.* at 9a n.1; cf. *id.* at 20a-21a (Moore, J., dissenting); *id.* at 48a-49a (CFC opinion); but held Section 1500 inapplicable because, in its view, the Tribe's two complaints did not seek the "same relief," *id.* at 9a. That was error.

In *Casman*, Casman brought suit in district court seeking an order to reinstate him to his former government position, from which he claimed to have been wrongfully discharged. 135 Ct. Cl. at 648. While that action was pending, Casman filed suit in the Court of Claims "to recover salary for the alleged wrongful separation." *Ibid.* The Court of Claims held that Section 1500 did not preclude its exercise of jurisdiction. The court reasoned that Section 1500's purpose was "to require an election between a suit in the Court of Claims and one brought in another court," and it concluded that the statute therefore should not apply if the "plaintiff has no right to elect between two courts." *Id.* at 649-650. Because Casman's request for back pay fell "exclusively within the [Court of Claims'] jurisdiction," and because the Court of Claims (at the time) lacked "jurisdiction to" grant Casman's request for specific relief "restor[ing] [him] to his [federal] position," the Court of Claims held that Section 1500 did not apply when such

"entirely different" relief must be sought in different courts. *Ibid.*[6]

Casman's focus on the type of relief sought by the plaintiff in a suit in another court finds no textual foundation in Section 1500. A suit seeking specific relief rather than monetary relief is nevertheless a "suit or process." And although the suit may not be "for" the CFC claim under Section 1500, it qualifies as a suit "in respect to" that claim if it arises from substantially the same operative facts. A leading commentary on Section 1500 has therefore properly concluded that the court in *Casman* "overr[ode] the words of the section." David Schwartz, *Section 1500 of the Judicial Code And Duplicate Suits Against the Government and its Agents*, 55 Geo. L.J. 573, 587 (1967); cf. *Keene*, 508 U.S. at 206, 217 (citing this commentary); *id.* at 221 (Stevens, J., dissenting) (same).

Casman did not purport to interpret Section 1500's statutory text. It instead concluded that Section 1500 should not apply where jurisdictional restrictions prohibit a plaintiff from seeking all relief in a single court because, in those circumstances, the "plaintiff has no right to elect between two courts." 135 Ct. Cl. at 649-650. But nothing in Section 1500 suggests that it forces a plaintiff's election between a CFC claim and a suit in another court only if the plaintiff could seek all forms of relief in a single court.

Indeed, *Keene* specifically concluded that Section 1500 bars CFC jurisdiction even in circumstances in

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[6] In 1972, Congress eliminated the problem that concerned the *Casman* court by authorizing federal employees to seek both back pay and reinstatement in the Court of Claims (now the CFC). See Act of Aug. 29, 1972, Pub. L. No. 92-415, § 1, 86 Stat. 652 (28 U.S.C. 1491(a)(2)); S. Rep. No. 1066, 92d Cong., 2d Sess. 2 (1972).

which the CFC action and the plaintiff's other suit involve claims that could not have been "joined in a single suit." 508 U.S. at 213. The Court held that the CFC lacked jurisdiction over Keene's contract-based claim (in *Keene I*) where Keene had brought a district-court action against the government seeking monetary relief on indemnification and contribution theories, *id.* at 203, thus forcing Keene to elect between suing in the CFC and suing in another court even though the legal theories that could be raised in such suits were distinct. *Id.* at 213-214 & n.7. A suit in district court arising from the same factual foundation can therefore qualify as a suit "in respect to" the plaintiff's CFC claim even though its request for district court relief "rest[s] on a legal theory that could [not] have been pleaded" in the CFC or that lies "*beyond the jurisdiction* of the [CFC]." See *id.* 213-214 (emphasis added). The Court recognized that Section 1500's jurisdictional restrictions may "deprive plaintiffs of an opportunity to assert rights that Congress has generally made available," but emphasized that only Congress—not the courts—may remove such "apparent hardship" through new legislation. *Id.* at 217-218 (quoting *Corona Coal Co.* v. *United States*, 263 U.S. 537, 540 (1924)).

It follows from *Keene* that Congress required plaintiffs, rather than suing simultaneously in two courts, to elect at least as an initial matter between fora in which they can have dramatically different prospects of successfully securing relief. Those differences in legal theory would also typically result in differences in the judicial relief that the plaintiff would ultimately be able to secure. Requiring a plaintiff to elect between a CFC claim and a factually related suit seeking "different relief" therefore is not materially different from requiring

the plaintiff to make the election at issue in *Keene*. Such an election may lead to the plaintiff's recovery of no relief or a different measure of relief than would have been available in the other suit. In short, *Casman*'s allowance of a simultaneous action in the CFC seeking different relief is inconsistent with *Keene*'s reasoning.[7]

The Federal Circuit's rationale in *Loveladies* is equally wanting. *Loveladies*' premise was that Section 1500 applies only if a plaintiff's "'claims' * * * brought to the [CFC] are the same as the 'claims' * * * sued upon in the district court." 27 F.3d at 1549, 1551. We can assume *arguendo* that this premise would be true if Congress had precluded jurisdiction only when a plaintiff has a "suit or process" in another court "for" the plaintiff's claim in the CFC. But Section 1500 also applies even when the plaintiff's claims in its two suits are distinct because it applies not just when the other suit is "for" the same claim but also when it is a suit "in respect to" that claim. See pp. 20-21, *supra*.

2. The Federal Circuit's policy analysis does not justify its restrictive reading of Section 1500

The Federal Circuit's interpretation of Section 1500, rather than focusing on statutory text, relied on its own understanding of policy arguments. In so doing, the court contravened established principles governing the interpretation of statutes restricting federal jurisdiction and waivers of sovereign immunity. The court's imposition of an extra-textual exception to Section 1500 based on the "relief" that a plaintiff requests erroneously

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[7] The election *Keene* requires does not foreclose a plaintiff who chooses to file a suit in district court from bringing a subsequent action in the CFC after the district court suit has been terminated if the plaintiff's CFC claim ultimately survives the district court's judgment.

hinges federal jurisdiction on a collection of intricate pleading concepts wholly detached from the relief available in a suit, rewards gamesmanship by litigants, and ultimately circumvents the jurisdictional bar that Congress enacted to prevent plaintiffs from pursuing in the CFC and other courts parallel suits against the United States that arise from the same factual foundation.

The court of appeals reasoned that its decision does not improperly "undermine the policy and purpose of § 1500" of preventing plaintiffs from pursuing two simultaneous actions against the United States (or its agents) in different courts because, "[i]n practice, § 1500 does not actually prevent a plaintiff from filing two actions seeking the same relief for the same claims." Pet. App. 15a-16a. The court explained that its precedent in *Tecon Engineers, Inc.* v. *United States*, 343 F.2d 943 (Ct. Cl. 1965), created an "anomalous rule" under which a plaintiff may evade Section 1500 by strategically "order[ing]" his actions—that is, by filing his CFC claim prior to filing a related suit in another court. Pet. App. 16a-17a. Observing that under this view Section 1500 "would never have even come into play" if the Tribe had "simply filed its complaints in reverse order," the court declared that it found no "purpose that § 1500 serves today," that Section 1500 requires "nothing more than a 'jurisdictional dance,'" and that concerns about undermining Section 1500 therefore are "of no real consequence." *Id.* at 17a (quoting *Loveladies*, 27 F.3d at 1549). On that basis, the court erroneously chose to disregard the statute's terms and dismantle its protections. The court had no basis to ignore the jurisdictional limitations in Section 1500 in that manner.

a. This Court emphasized in *Keene* that Section 1500's "'limits upon federal jurisdiction . . . must be

neither disregarded nor evaded,'" because it is "Congress [that] has the constitutional authority to define the jurisdiction of the lower federal courts." *Keene*, 508 U.S. at 207, 217 (quoting *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 374 (1979), and citing *Finley* v. *United States*, 490 U.S. 545, 548 (1989)). Yet the Federal Circuit nevertheless adopted an unduly narrow interpretation of Section 1500 based in part on the premise that its decision in *Tecon* had previously succeeded in rendering Section 1500 a readily evaded formality. Nothing could be further from the teachings of this Court than this seemingly purposeful attempt to progressively erode a jurisdictional restriction.

The court erred in relying on *Tecon*'s limitation of Section 1500, Pet. App. 16a, because (as the en banc Federal Circuit had previously declared) that order-of-filing rule is incorrect. See *UNR Indus.*, 962 F.2d at 1020, 1023.[8] Section 1500 applies regardless whether a plaintiff files its CFC claim first or second, because it precludes CFC "jurisdiction" whenever the plaintiff has "pending" in another court a suit that is related to its CFC claim. See 28 U.S.C. 1500. The Court of Claims thus itself had held (even before *Tecon*) that Section 1500 "clearly deprive[s] th[e] court of jurisdiction" when a plaintiff files its other suit after filing its claim in the

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[8] Although *Tecon*'s rule does not directly apply to this case because the Tribe filed suit in district court (one day) before filing in the CFC, the court of appeals incorporated *Tecon*'s interpretation of Section 1500 into its *ratio decidendi* by concluding that the outcome in this case comports with the narrow and self-defeating purpose *Tecon* had attributed to Section 1500. Because the Federal Circuit's order-of-filing rule was part of its *ratio decidendi*, it is appropriate for this Court to reject that extra-textual limitation on Section 1500 in order to restore the proper overall interpretation of the jurisdictional bar.

Court of Claims (now the CFC). *Hobbs* v. *United States*, 168 Ct. Cl. 646, 647-648 (1964) (per curiam); see *Maguire Indus., Inc.* v. *United States*, 114 Ct. Cl. 687, 688, 690 (1949) (assuming that Tax Court action was an agency proceeding and treating appeal therefrom as a later-filed suit in another court precluding CFC jurisdiction), cert. denied, 340 U.S. 809 (1950).

The only two decisions of this Court prior to *Keene* that found the statute applicable confirm that conclusion. Both held that the jurisdictional bar in Section 1500's direct predecessor applied when the Court of Claims (now CFC) action was filed first. See *In re Skinner & Eddy Corp.*, 265 U.S. 86, 92, 95 (1924) (Court of Claims erred in vacating voluntary dismissal of petition because the plaintiff filed a state court action immediately after the dismissal); *Corona Coal*, 263 U.S. at 539-540 (dismissing appeal from Court of Claims decision because related district court action was filed while the appeal was pending). To be sure, the relevant text was even clearer before 1948, when plaintiffs were expressly prohibited from "fil[ing] or *prosecut[ing]*" any claim in the Court of Claims if they had a related suit "pending in any other court." 28 U.S.C. 260 (1946) (emphasis added). But as *Keene* makes clear, Congress's enactment of Section 1500 made no change to the "underlying substantive law" with its "deletion of the 'file or prosecute' language in favor of the current reference to 'jurisdiction.'" 508 U.S. at 209; see *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957) (explaining that "no changes of law or policy are to be presumed from changes of language" in the 1948 codification of the Judicial Code "unless an intent to make such changes is

clearly expressed");[9] cf. *Keene*, 508 U.S. at 212 (observing that Congress presumably was aware of similar pre-codification decisions and adopted them in its 1948 codification of Title 28). Thus, while *Keene* reserved the question whether *Tecon* was properly decided, 508 U.S. at 209 n.4, *Keene*'s rationale and this Court's prior precedents compel the conclusion that it was not.[10]

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[9] See also *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 831 n.4 (1989) (following *Fourco Glass* to construe 1948 codification of Title 28); *Finley*, 490 U.S. at 554 (same); *Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 350 n.15 (1976) (same).

[10] The court in *Tecon* was likely motivated to retain jurisdiction because the plaintiffs before it, after conducting a significant amount of litigation in the Court of Claims, "filed the same claims in a district court and then moved the Court of Claims to dismiss [their] case under Section 1500." *UNR Indus.*, 962 F.2d at 1020. The government and the Court of Claims viewed the plaintiff's effort to force the Court of Claims to release jurisdiction as unacceptable conduct and the court, at the government's urging, "retained jurisdiction so it could dismiss the [plaintiff's] case with prejudice." See *ibid.* Although the government supported that result at the time, it subsequently concluded, based on further experience, that Section 1500 should be enforced by its terms and that similar conduct by plaintiffs "should be addressed by imposing sanctions for abuse of process and vexatious litigation." U.S. Br. at 39 n.19, *Keene*, *supra* (No. 92-166); see *UNR Indus.*, 962 F.2d at 1020.

The bizarre litigation spawned by *Tecon*'s order-of-filing rule confirms this judgment. Plaintiffs have filed numerous pairs of related cases on the same day, see, *e.g.*, Pet. App. 94a-98a, requiring evidentiary hearings to determine the *time* at which a messenger delivered (and court clerks filed) the relevant complaints. In such cases, *Tecon* makes federal jurisdiction turn on whether a CFC judge finds sufficiently credible the testimony of the plaintiff's messenger (perhaps years after the fact) regarding the specific times that the plaintiff's complaints arrived at each court. See, *e.g.*, *Passamaquoddy Tribe* v. *United States*, 82 Fed. Cl. 256, 274-280 (2008) (finding such testimony neither "persuasive [n]or credible" after evidentiary hearings).

b. The Federal Circuit's departure from the text, history, and purpose of Section 1500 cannot be justified by its view of "sound policy"—that "[t]he nation is served by private litigation" against the sovereign that can "control the excesses to which Government may from time to time be prone." Pet. App. 17a-18a (quoting *Loveladies*, 27 F.3d at 1555-1556). That rationale not only disregards *Keene*'s admonition that Congress—not the courts—must make any revision to Section 1500 in light of policy considerations, see 508 U.S. at 217-218, but also contravenes fundamental tenets of federal sovereign immunity.

As the Tribe's own complaint reflects (Pet. App. 60a), Congress enacted limited waivers of sovereign immunity in the Tucker Act and Indian Tucker Act by conferring jurisdiction on the CFC to hear certain claims against the United States. See *Navajo Nation*, 129 S. Ct. at 1551 (Tucker Act and Indian Tucker Act are "jurisdictional provisions that operate to waive sovereign immunity"); *Mitchell*, 463 U.S. at 212 & n.8, 215 (similar); see also *Testan*, 424 U.S. at 398; *Tempel* v. *United States*, 248 U.S. 121, 129 (1918). Congress enacted those waivers to precisely the extent it wished, against the well-understood backdrop of Section 1500's longstanding limits on the scope of Congress's consent to suit in the Court of Claims and now the CFC. As explained above, the scope of such waivers, including the "limitations and conditions upon which the Government consents to be sued," must be "strictly observed and exceptions thereto are not to be implied." *Nakshian*, 453 U.S. at 161 (citation omitted); see pp. 25-26, *supra*.

By invoking policy rationales to insist that Congress provide "a clear expression of [its] intent" to preserve sovereign immunity and limit CFC jurisdiction, Pet.

App. 18a (citation omitted), the Federal Circuit had it precisely backwards: It is the "elimination"—not the preservation—"of sovereign immunity" that must be "unequivocal[ly] express[ed]," and that "expression" must itself be found "in statutory text," *Nordic Vill., Inc.*, 503 U.S. at 37; see *id.* at 33-34, and must be "strictly construed, in terms of its scope," *Blue Fox, Inc.*, 525 U.S. at 261. Indeed, the court of appeals has repeated the error of its predecessor, which had entertained claims under the Declaratory Judgment Act's authorization for "any court" to award declaratory relief, 28 U.S.C. 2201, by mistakenly requiring the government to show a "clear indication that Congress affirmatively intended to exclude" the Court of Claims from that authorization. *United States* v. *King*, 395 U.S. 1, 4 (1969). Then as now, the search for a "clear indication" that Congress affirmatively preserved sovereign immunity is entirely ill conceived; the relevant demand is for an "unequivocal[] express[ion]" defining the "extent" of a waiver of immunity. *Ibid.*

The Federal Circuit's belief that it would be "sound policy" to subject the sovereign to suits for damages in the CFC, notwithstanding the pendency of suits in district court based on substantially the same operative facts, is doubly flawed. From a historical perspective, it ignores that *congressional* waivers of immunity were needed to create the CFC's predecessor (the Court of Claims) and confer its authority. See pp. 2-3, *supra*. And, more fundamentally, it disregards this Court's clear instruction that "policy, no matter how compelling, is insufficient" to "waive [sovereign] immunity." *Library of Cong.* v. *Shaw*, 478 U.S. 310, 321 (1986).

c. The Federal Circuit's decision to base the CFC's jurisdiction on whether a plaintiff seeks the same "re-

lief" in its two suits, and its understanding that "it is the relief that the plaintiff *requests* [in its complaint] that is relevant," Pet. App. 10a, 15a, invoke pleading concepts entirely ill suited for the jurisdictional rule here. The judicial relief ultimately available on a claim in both the CFC and the district court is the "relief to which [the] party is entitled, even if the party has not demanded that relief in its pleadings." Fed. R. Civ. P. 54(c) (adopted 1937); see Fed. Cl. R. 54(c) (same text). A court therefore may grant legal damages even if a complaint seeks only equitable relief (and vice versa), and may award a quantum of monetary relief greater than that requested in the pleadings. 10 James Wm. Moore, *Moore's Federal Practice* § 54.72[1][b]-[c], at 54-133 to 54-135 (3d ed. 2009) (citing cases). Except for a default judgment, the proof adduced in litigation rather than the pleadings will determine the relief that a court should award. See *id.* § 54.72[1][a], at 54-130; Charles Alan Wright et al., *Federal Practice and Procedure* § 2664, at 173-174 & n.2 (1998) (explaining that a party's demand for relief in its pleadings under Fed. R. Civ. P. 8(a)(3), does not govern the relief granted outside the context of a default judgment; citing cases).

Rule 54(c) thus highlights the folly of hinging Section 1500's jurisdictional restrictions on the relief identified in a plaintiff's complaints. The Federal Circuit's approach encourages strategic manipulation of the pleading process to circumvent the Section 1500 bar when, at the end of the day, the details of a plaintiff's demand for relief would not restrict the relief ultimately available in either the CFC or the district court.

II. THE TRIBE DID NOT SEEK "DIFFERENT RELIEF" IN DISTRICT COURT BECAUSE BOTH CASES SOUGHT MONETARY RELIEF AND OTHER OVERLAPPING RELIEF

Even if *Casman* were correct in concluding that Section 1500 does not preclude simultaneous suits if they seek "entirely different" relief, *Casman*, 135 Ct. Cl. at 650, the Federal Circuit erred in holding that the Tribe's requests for monetary relief in the CFC and district court qualify as different relief. The court of appeals' conclusion that identifying and distinguishing the legal or equitable bases for such relief is "critical to the § 1500 analysis," Pet. App. 12a, is both incorrect and inconsistent with *Keene*.

A. *Keene* held that Section 1500 requires dismissal of a CFC claim if "the plaintiff's other suit [is] based on substantially the same operative facts as the [CFC] action, at least if there [is] some overlap in the relief requested." 508 U.S. at 212. The Court thereby acknowledged (but declined to resolve) the *Casman*-based argument that suits based on substantially the same facts might not trigger Section 1500 if they seek "completely different relief"—*i.e.*, "distinctly different types of relief." *Id.* at 212 n.6, 216; see *id.* at 214 n.9 (emphasizing that *Casman* is "limited to that situation"). *Casman*, as noted, concluded that the specific (injunctive) relief of prospective reinstatement available in district court and retrospective monetary relief available in the Court of Claims were "entirely different." 135 Ct. Cl. at 650. *Keene* accordingly held that *Casman*'s exception, even if valid, was inapplicable because Keene sought "monetary relief" in both the CFC and the district court actions. *Keene*, 508 U.S. at 216.

The Federal Circuit in this case nevertheless concluded that monetary relief that the Tribe seeks in the CFC and monetary relief in district court are "completely different" for purposes of Section 1500. The court found it dispositive that the Tribe styled its requests as ones for "damages at law, not equitable relief," in the CFC and for "equitable relief and not damages" in district court. Pet App. 11a-12a. The technical law-equity distinction the court found "critical to the § 1500 analysis," *id.* at 12a, strays even further afield from Section 1500's text than does the holding in *Casman*. Even if it is assumed for present purposes that a suit seeking equitable monetary relief might not be "for" a CFC claim for money damages in some technical sense, if it arises from substantially the same operative facts, it is a suit "in respect to" that claim because it is related to the claim and has "at least * * * some overlap" with it, *Keene*, 508 U.S. at 212. The Federal Circuit's narrow focus on the doctrinal theory for relief, relevant in the days of a divided bench, disregards *Keene*'s teaching that Congress eschewed "a narrow concept of identity" in Section 1500 and so denied plaintiffs a "liberal opportunity to maintain two suits arising from the same factual foundation." *Id.* at 213.

If the law-equity distinction were relevant to *Casman*'s exception, *Keene* would have had to address it. But the Court did not do so. Without inquiring whether the "monetary relief" sought in Keene's CFC and district court cases constituted relief at law or at equity, the Court held that the exception for "distinctly different types of relief" did not apply because both actions sought "monetary relief" from the government. 508 U.S. at 216.

Indeed, the Court likely would have reversed rather than affirmed in *Keene* if the Federal Circuit's distinction were correct. The Court affirmed dismissal of a CFC breach-of-contract claim (*Keene I*) because, in a separate district court tort action in which Keene was the defendant, Keene had pending a third-party complaint "seeking indemnification or contribution from the Government" for any damages that might be awarded against Keene. See *Keene*, 508 U.S. at 203-204, 213 & n.7, 216. Indemnification and contribution are understood to be equitable relief.[11] Thus, if the Federal Circuit were correct, Section 1500 would not have applied in *Keene* because such equitable monetary relief would have been "different relief" than legal contract damages. *Keene*, of course, held otherwise.

B. The Federal Circuit's misguided approach led it into a thicket of elusive and technical distinctions, largely based on the Tribe's characterization of its own complaints. That result is in derogation of the principle that "jurisdictional rules should be clear," especially in the sovereign immunity context. See *Lapides* v. *Board of Regents of Univ. Sys.*, 535 U.S. 613, 621 (2002); *Heckler* v. *Edwards*, 465 U.S. 870, 877 (1984) (explaining that "litigants ought to be able to apply a clear test to determine" which federal court has jurisdiction). "[A]dminis-

[11] See, *e.g.*, *United States* v. *Atlantic Research Corp.*, 551 U.S. 128, 141 (2007) (ruling that "traditional rules of equity" govern statutory contribution claim); Restatement (Second) of Torts § 886A cmt. c at 338-339 (1979) ("Contribution is a remedy that developed in equity" and is governed by "equity rules" in the tort context.); *id.* § 886B cmt. c and f at 345-347 (explaining that "[t]he basis for indemnity" is the equitable concept of unjust enrichment and restitution; discussing relationship to contribution); 2 Joseph Story, *Commentaries on Equity Jurisprudence* § 648, at 63 (1918) (surveying the "equitable doctrine of contribution").

trative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp.* v. *Friend*, 130 S. Ct. 1181, 1193 (2010). The creation of "[c]omplex jurisdictional tests" should therefore be avoided because they encourage "gamesmanship" by litigants, consume "[j]udicial resources," and lead to legal uncertainty. *Ibid.* The decision below vividly illustrates the point.

The court of appeals first reasoned that the Tribe's actions do not seek overlapping relief because the Tribe's district court complaint seeks what the Tribe has chosen to call "old money" (*i.e.*, "money that is already in the government's possession, but that erroneously does not appear in the [Tribe's] accounts"), whereas its CFC complaint seeks what the Tribe has chosen to call "new money" (*i.e.*, "profits that the [Tribe] would have made but for the United States' mismanagement"). Pet. App. 13a. Those labels and distinctions appear nowhere in the complaints, are the result of counsel's ex-post re-characterization of the claims in the Tribe's intertwined complaints (see *id.* at 53a n.14), and are, as the dissenting judge explained, untenable, *id.* at 22a-25a.

In fact, as the dissenting judge noted, the Tribe's CFC complaint—not just its district court complaint—seeks so-called "old money" (money allegedly already in the government's possession) by challenging the government's trust-account record-keeping. See Pet. App. 23a-25a; pp. 9-10, *supra* (discussing CFC complaint). The majority reiterated its law-equity distinction in arguing that the Tribe's CFC complaint seeks "*damages* alone" and not "equitable relief of any type," Pet. App. 14a, but it provided no reasoned response—let alone one consistent with liberal notice-pleading rules—to the simple observation that the Tribe's complaints seek overlapping monetary relief.

Conversely, the Tribe's district court complaint—not just its CFC complaint—seeks so-called "new money" (money not allegedly already in the government's possession). It does so by requesting monetary relief under equitable doctrines for any injuries resulting from the government's alleged violation of fiduciary duties to "invest" the Tribe's trust assets properly and "maximize profits" therefrom. Pet. App. 76a, 84a; see *id.* at 83a (duty to "invest" trust funds "to maximize the[ir] productivity"); *id.* at 86a (identifying purported statutory investment duty). Indeed, the district court complaint specifically states that its request for a trust-fund accounting is "not limited to" the "funds under the custody and control of the United States," so as to capture such unrealized profits. See *id.* at 91a. And in both stating its claims and articulating its prayer for relief, the Tribe requests "equitable restitution," "disgorgement," and "any additional equitable relief" that may be appropriate. *Ibid.*; *id.* at 92a (prayer for relief).

The Federal Circuit's conclusion that the Tribe does not seek an "accounting" in both courts because it does not include an express request for an accounting in its "prayer for relief" in the CFC, Pet. App. 15a, further underscores the error in its approach to Section 1500. Even if the Tribe in the CFC sought only to recover profits lost because of mismanagement of the funds already held in trust (so-called "new money"), an accounting would be necessary to determine the "principal" that should have been invested if the Tribe were to establish a pertinent governmental investment-related violation of a statute. Without knowing that initial investment, there is no way to determine the proper amount of investment profits. The court of appeals accordingly acknowledged that "what would ensue [in the CFC] would

amount to an accounting," *ibid.* (quoting *id.* at 41a), but found that result irrelevant to the application of Section 1500.

The court's technicality-laden analysis finds no support in the text of Section 1500. That provision does not refer to "legal" or "equitable" relief—or indeed to the type of relief sought at all—and therefore provides no basis for the Federal Circuit to hinge Section 1500's application on an assessment of the historical and jurisprudential roots for the relief. Cf. *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 253 (1993) (construing the term "appropriate equitable relief" under ERISA, 29 U.S.C. 1132(a)(5)). And the court of appeals' approach, if adopted by this Court, would inevitably create incentives for counsel to generate novel and intricate distinctions in order to pursue the duplicative litigation that Section 1500 was intended to foreclose, thereby opening the door to inconsistent decisions.

Section 1500, properly read, prevents that result and precludes CFC jurisdiction whenever a plaintiff's district court suit against the United States has some "relation or reference to," or "is concerned with," the plaintiff's claim against the government in the CFC. See pp. 21-22, *supra*. That is so with respect to the Tribe's complaint in its district court action for breach of trust, and the CFC therefore properly held that Section 1500 foreclosed jurisdiction over the Tribe's parallel CFC claim.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

IGNACIA S. MORENO
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

ANTHONY A. YANG
Assistant to the Solicitor General

HILARY C. TOMPKINS
Solicitor
Department of the Interior

AARON P. AVILA
Attorney

JULY 2010

RESPONDENT'S BRIEF

No. 09-846

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

TOHONO O'ODHAM NATION,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR RESPONDENT

KEITH M. HARPER
G. WILLIAM AUSTIN
CATHERINE F. MUNSON
KILPATRICK STOCKTON LLP
607 14th Street, N.W.
Washington, D.C. 20005
(202) 508-5800

ADAM H. CHARNES
KILPATRICK STOCKTON LLP
1001 West Fourth Street
Winston-Salem, NC 27101
(336) 607-7300

RAYMOND M. BENNETT
KILPATRICK STOCKTON LLP
3737 Glenwood Ave.
Raleigh, NC 27612
(919) 420-1700

SETH P. WAXMAN
Counsel of Record
DANIELLE SPINELLI
CATHERINE M.A. CARROLL
ANNIE L. OWENS
SONYA L. LEBSACK
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

335

QUESTION PRESENTED

Whether 28 U.S.C. §1500 strips the Court of Federal Claims of jurisdiction over a claim against the United States for money damages if the plaintiff has pending in district court a suit against the United States seeking different relief.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES vi

STATEMENT 1

SUMMARY OF ARGUMENT 13

ARGUMENT 17

I. SECTION 1500 APPLIES ONLY WHEN A PENDING ACTION SEEKS THE SAME RELIEF AS THE CLAIM ASSERTED IN THE CFC 17

A. The Text And Structure Of The Jurisdictional Scheme Demonstrate That §1500 Applies Only To Claims Seeking The Same Relief 17

B. The Statute's History And Purpose Support Reading §1500 To Bar Only Suits Seeking The Same Relief 25

C. The Court Of Claims And Its Successors Have Held That §1500 Applies Only To Claims For The Same Relief, And Congress Has Implicitly Ratified That Interpretation 28

D. The Government's Reading Of §1500 Would Lead to Absurd And Unjust Results 32

E. Sovereign Immunity Principles Do Not Warrant Reading §1500 To Bar Claimants From Obtaining Complete Relief 36

TABLE OF CONTENTS—Continued

Page

F. The *Tecon* Rule Is Not Before This Court 40

II. Because Each Of The Nation's Suits Seeks Different Relief, Section 1500 Does Not Bar The Nation's CFC Action 41

A. Each Complaint Seeks Different Relief To Redress A Different Breach Of Trust 41

B. The Relief Sought In The Nation's Two Suits Does Not Overlap 47

CONCLUSION 53

STATUTORY ADDENDUM

Act of Feb. 24, 1855, ch. 122, §1, 10 Stat. 612, 612 ..... 1a

Act of Mar. 3, 1863, ch. 92, §§1-3, 5, 12 Stat. 765, 765, 766 ..... 1a

Act of Mar. 3, 1863, ch. 120, §§1-3, 12 Stat. 820, 820 ..... 3a

Act of June 25, 1868, ch. 71, §8, 15 Stat. 75, 77 ..... 5a

1 Rev. Stat. 197, §1067 (2d ed. 1878) 5a

Act of Mar. 3, 1887, ch. 359, §§1-2, 24 Stat. 505, 505 ..... 5a

Act of Mar. 3, 1911, ch. 231, §154, 36 Stat. 1087, 1138 ..... 7a

Act of Aug. 13, 1946, ch. 959, §24, 60 Stat. 1049, 1055-1056 ..... 7a

TABLE OF CONTENTS—Continued

Page

Act of June 25, 1948, ch. 646, §1500, 62 Stat. 869, 942 ..... 8a

28 U.S.C. §1500 (2006) 8a

TABLE OF AUTHORITIES

CASES

Page(s)

AD Global Fund, LLC v. *United States*, 68 Fed. Cl. 663 (2005) 24

Allied Materials & Equipment Co. v. *United States*, 210 Ct. Cl. 714 (1976) 29

Black v. *Cutter Laboratories*, 351 U.S. 292 (1956) 41

Block v. *Neal*, 460 U.S. 289 (1983) 36

Boston Five Cents Savings Bank, FSB v. *United States*, 864 F.2d 137 (Fed. Cir. 1988) 29, 35

Bowen v. *Massachusetts*, 487 U.S. 879 (1988) 50

Branch v. *Smith*, 538 U.S. 254 (2003) 19

British American Tobacco Co. v. *United States*, 89 Ct. Cl. 438 (1939) 27, 29

Casman v. *United States*, 135 Ct. Cl. 647 (1956) 2, 28, 29, 33

Cherokee Nation v. *United States*, 21 Cl. Ct. 565 (1990) 46

Cheyenne-Arapaho Tribes v. *United States*, 512 F.2d 1390(Ct. Cl. 1975) 9

Clinton v. *Jones*, 520 U.S. 681 (1997) 40

Cobell v. *Babbitt*, 91 F. Supp. 2d 1 (D.D.C. 1999) 47

Corona Coal Co. v. *United States*, 263 U.S. 537 (1924) 29

TABLE OF AUTHORITIES—Continued

Page(s)

Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 45

DaimlerChrysler Corp. v. *Cuno*, 547 U.S. 332 (2006) 18

Dennistoun v. *Draper*, 7 F. Cas. 488 (C.C.S.D.N.Y. 1866) 4

Department of Army v. *Blue Fox, Inc.*, 525 U.S. 255 (1999) 36, 50, 51, 52

Dolan v. *United States Postal Service*, 546 U.S. 481 (1996) 37, 38

Eastern Shawnee Tribe v. *United States*, 582 F.3d 1306 (Fed. Cir. 2009) 35

E.E. Bolles Wooden Ware Co. v. *United States*, 106 U.S. 432 (1882) 26

Franconia Associates v. *United States*, 536 U.S. 129 (2002) 39

Glidden Co. v. *Zdanok*, 370 U.S. 530 (1962) 7

Great-West Life & Annuity Insurance Co. v. *Knudson*, 534 U.S. 204 (2002) 50, 51

Griffin v. *Oceanic Contractors, Inc.*, 458 U.S. 564 (1982) 32

Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) 40

Hobbs v. *McLean*, 117 U.S. 567 (1886) 18

In re Skinner & Eddy Corp., 265 U.S. 86 (1924) 29

Irwin v. *Department of Veterans Affairs*, 498 U.S. 89 (1990) 39

TABLE OF AUTHORITIES —Continued

Page(s)

John R. Sand & Gravel Co. v. *United States*, 552 U.S. 130 (2008) 33

Johns-Manville Corp. v. *United States*, 855 F.2d 1556 (Fed. Cir. 1988) 25

Keene Corp. v. *United States*, 508 U.S. 200 (1993) ..... *passim*

Klamath & Modoc Tribes v. *United States*, 174 Ct. Cl. 483 (1966) 11, 34, 46, 49

Kosak v. *United States*, 465 U.S. 848 (1984) 23, 37

Landis v. *North American Co.*, 299 U.S. 248 (1936) 35

Lane v. *Peña*, 518 U.S. 187 (1996) 37

Lehman v. *Nakshian*, 453 U.S. 156 (1981) 37

Lorillard v. *Pons*, 434 U.S. 575 (1978) 30

Los Angeles v. *Lyons*, 461 U.S. 95 (1983) 18

Loveladies Harbor, Inc. v. *United States*, 27 F.3d 1545 (Fed. Cir. 1994) 12, 22, 29, 30, 33, 35

Matson Navigation Co. v. *United States*, 284 U.S. 352 (1932) 4, 25

McLeod v. *Callicott*, 16 F. Cas. 295 (C.C.D.S.C. 1869) 4

Moseley v. *V Secret Catalogue, Inc.*, 537 U.S. 418 (2003) 19

National Air Traffic Controllers Ass'n v. *United States*, 160 F.3d 714 (Fed. Cir. 1998) 21

TABLE OF AUTHORITIES—Continued

Page(s)

New York State Conference of Blue Cross & Blue Shield Plans v. *Travelers Insurance Co.*, 514 U.S. 645 (1995) 23

Osage Nation v. *United States*, 57 Fed. Cl. 392 (2003) 46

Overall Roofing & Construction Inc. v. *United States*, 929 F.2d 687 (Fed. Cir. 1991) 21

Papago Tribe v. *United States*, 38 Ind. Cl. Comm'n 542 (1976) 8

Pauley Petroleum Inc. v. *United States*, 591 F.2d 1308 (Ct. Cl. 1979) 49

Richlin Security Service Co. v. *Chertoff*, 128 S. Ct. 2007 (2008) 40

Ruckelshaus v. *Sierra Club*, 463 U.S. 680 (1983) 37

Scarborough v. *Principi*, 541 U.S. 401 (2004) 39

Shepard v. *United States*, 544 U.S. 13 (2005) 31

Smiley v. *Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996) 18

Smith v. *City of Jackson*, 544 U.S. 228 (2005) 20

Tecon Engineers, Inc. v. *United States*, 343 F.2d 943 (Ct. Cl. 1965) 40

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TABLE OF AUTHORITIES—Continued

Page(s)

UNR Industries, Inc. v. *United States*, 962 F.2d 1013 (Fed. Cir. 1992) 30

United States v. *Alire*, 73 U.S. (6 Wall.) 573 (1868) 20

United States v. *Emery, Bird, Thayer Realty Co.*, 237 U.S. 28 (1915) 53

United States v. *Freeman*, 44 U.S. (3 How.) 556 (1845) 20

United States v. *Hougham*, 364 U.S. 310 (1960) 53

United States v. *Idaho*, 508 U.S. 1 (1993) 39

United States v. *Jones*, 131 U.S. 1 (1889) 21

United States v. *Mitchell*, 463 U.S. 206 (1983) ..... *passim*

United States v. *New York Rayon Importing Co.*, 329 U.S. 654 (1947) 36

United States v. *Nordic Village, Inc.*, 503 U.S. 30 (1992) 36

United States v. *Testan*, 424 U.S. 392 (1976) 46

United States v. *Williams*, 514 U.S. 527 (1995) 36, 39, 40

United States v. *Yellow Cab Co.*, 340 U.S. 543 (1951) 37

White Mountain Apache Tribe v. *United States*, 26 Cl. Ct. 446 (1992) 9

Winthrop Iron Co. v. *Meeker*, 109 U.S. 180 (1883) 49

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES AND REGULATIONS

Administrative Procedure Act,
5 U.S.C. §702 ..... 8, 11, 34, 36, 46

11 U.S.C. §106(c) 36

American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C.
§§4001 *et seq.* 9
§4022 48

28 U.S.C.
§1292(d)(2) 14, 24
§1346(a)(1) 36
§1346(a)(2) 7
§1346(b)(1) 7, 8
§1491 36
§1491(a)(1) 7
§1491(a)(2) 21, 31, 46
§1491(b)(2) 21
§1500 ..... *passim*
§1505 ..... 7, 36
§2501 39
§2516 37
§2674 7
§2680(h) 37

Act of Feb. 24, 1855, ch. 122, 10 Stat. 612 ..... 3, 20

Act of Mar. 3, 1863, ch. 92, 12 Stat. 765 ..... 3, 20

Act of Mar. 3, 1863, ch. 120, 12 Stat. 820 ..... 4, 26

Act of Mar. 17, 1866, ch. 19, 14 Stat. 9 3

Act of June 25, 1868, ch. 71, 15 Stat. 75 5

TABLE OF AUTHORITIES—Continued

Page(s)

Act of Mar. 3, 1887, ch. 359, 24 Stat. 505 .....6, 20, 21

Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087 6

Act of Aug. 2, 1946, ch. 753, 60 Stat. 812 7

Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049 7

Act of June 25, 1948, ch. 646, 62 Stat. 869 6

Pub. L. No. 92-415, 86 Stat. 652 (1972) 31

Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 .....6, 31

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25 C.F.R. §162.619 48

LEGISLATIVE MATERIALS

Misplaced Trust, H.R. Rep. No. 102-499 (1992) 9

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IN THE

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No. 09-846

UNITED STATES OF AMERICA,

Petitioner,

v.

TOHONO O'ODHAM NATION,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT

Section 1500 of the Judiciary Code provides that the Court of Federal Claims "shall not have jurisdiction of any claim for or in respect to which the plaintiff ... has pending in any other court any suit or process against the United States." As this Court noted when it last considered §1500, the statute was enacted during Reconstruction in response to "duplicative lawsuits" by claimants suing in two different courts, on different theories, for the same substantive relief: monetary compensation for cotton seized in the Civil War. *Keene Corp.* v. *United States*, 508 U.S. 200, 206 (1993).

Over fifty years ago, the Court of Claims held that §1500 does not strip it of jurisdiction over a claim for money damages against the United States when the plaintiff has a suit pending in another court seeking *different* relief. *Casman* v. *United States*, 135 Ct. Cl. 647, 650 (1956). Such a suit, the court concluded, is not "for or in respect to" the claim in the CFC. *Id.* Moreover, because the Court of Claims could, with few exceptions, award only money damages, any other rule would leave some plaintiffs without a complete remedy for their injuries. *Id.* The Government and private litigants alike have long operated under the *Casman* rule, and Congress has implicitly ratified the Court of Claims' holding.

The Government now asks this Court to discard that established interpretation and hold that §1500 bars a plaintiff from seeking money damages in the CFC whenever the plaintiff has pending in another court any suit "associated in any way" with the CFC action—whether or not the suits seek duplicative relief, and whether or not the plaintiff could be made whole in a single action. That surpassingly broad reading of §1500 stretches the statute far beyond its text, disregards its historical purpose, and would lead to absurd and unjust results, forcing litigants to choose between money damages and equitable relief even if they are entitled to both. And it wrongly reads §1500 to thwart the goal of the larger jurisdictional scheme of which it is a part: to ensure that plaintiffs with claims against the Government obtain meaningful redress, consistent with President Lincoln's observation that "[i]t is as much the duty of Government to render prompt justice against itself, in favor of its citizens, as it is to administer the same between private individuals." Cong. Globe, 37th Cong., 2d Sess., App. 2 (1862).

1. a. Before 1855, Congress provided remedies to persons with claims against the Government by enacting private bills in individual cases. *United States* v. *Mitchell*, 463 U.S. 206, 212-213 (1983). Over time, requests for private bills mounted, and their disposition became increasingly burdensome. In 1855, Congress created the Court of Claims to "hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States." Act of Feb. 24, 1855, ch. 122, §1, 10 Stat. 612. The court operated as an advisory body, making recommendations to Congress, which retained final decision-making authority. *Id.* §§7-9, 10 Stat. 613-614; Cowen et al., *The United States Court of Claims* 13-19 (1978).

This system proved inadequate to resolve the enormous volume of Civil War claims. Nor did it provide a disinterested tribunal capable of "render[ing] prompt justice" against the Government. In 1863, therefore, at President Lincoln's urging, Congress authorized the Court of Claims to enter final judgment against the United States in the cases described in the 1855 Act. Act of Mar. 3, 1863, ch. 92, §3, 12 Stat. 765; Cowen 20-25.[1]

That same day, Congress enacted the Captured and Abandoned Property Act. CAPA authorized the Secretary of the Treasury to appoint agents to seize property—primarily cotton—in insurrectionist areas, auc-

[1] In 1866, Congress repealed a provision of the 1863 Act that had required Treasury to appropriate funds before judgments could be paid, making the court's judgments truly final. Act of Mar. 17, 1866, ch. 19, §1, 14 Stat. 9.

tion it, and retain the proceeds. Act of Mar. 3, 1863, ch. 120, §§1-2, 12 Stat. 820. CAPA also gave the owner of seized property the right to bring suit in the Court of Claims. If the owner could demonstrate that he had "never given any aid or comfort" to the rebellion, he could recover the auction proceeds, less the expenses incurred in the sale. *Id.* §3, 12 Stat. 820; Cowen 25-27.

Numerous claimants whose cotton had been seized brought suit against the United States under CAPA. Many claimants, however, had difficulty establishing that they had never given aid or comfort to the rebellion, as CAPA required. To circumvent that requirement, certain claimants also brought suits against Treasury officers or agents in state court (generally removed to federal court) on tort theories such as conversion or trespass. *Dennistoun* v. *Draper*, 7 F. Cas. 488 (C.C.S.D.N.Y. 1866); *McLeod* v. *Callicott*, 16 F. Cas. 295 (C.C.D.S.C. 1869); *see Keene*, 508 U.S. at 206; Schwartz, *Section 1500 of the Judicial Code*, 55 Geo. L.J. 573, 576-577 (1967).

Although they proceeded on different legal theories against different defendants, these tort suits sought the same relief for the same injury as their counterpart suits in the Court of Claims: money for the same confiscated cotton. Because, at the time, *res judicata* might not have barred successive suits against the United States and its officers or agents, the suits presented the prospect that the Government would be required to defend itself twice, or even that plaintiffs might recover twice, on account of the same captured property. *Matson Navigation Co.* v. *United States*, 284 U.S. 352, 355-356 (1932); Peabody et al., *A Confederate Ghost that Haunts the Federal Courts*, 4 Fed. Cir. B.J. 95, 99-102 (1994).

In 1868, seeking to stem the flood of claims arising from the Civil War, Congress enacted legislation requiring claimants to "prove affirmatively" their loyalty to the United States and expanding the United States' right to appeal Court of Claims judgments. Act of June 25, 1868, ch. 71, 15 Stat. 75; Schwartz 576-577. The predecessor to §1500 was a last-minute amendment to the 1868 Act. It provided:

> [N]o person shall file or prosecute any claim or suit in the court of claims, or an appeal therefrom, for or in respect to which he or any assignee of his shall have commenced and has pending any suit or process in any other court against any officer or person who, at the time ... the cause of action alleged in such suit or process arose, was in respect thereto acting or professing to act, mediately or immediately, under the authority of the United States.

1868 Act §8, 15 Stat. 77.

Its sponsor explained:

> The object of this amendment is to put to their election that large class of persons having cotton claims particularly, who have sued the Secretary of the Treasury and the other agents of the Government in more than a hundred suits that are now pending, scattered over the country here and there, and who are here at the same time endeavoring to prosecute their claims, and have filed them in the Court of Claims, so that after they put the Government to the expense of beating them once in a court of law they can turn around and try the whole question in the Court of Claims. The object is to put that class of persons to

> their election either to leave the Court of Claims or to leave the other courts.

Cong. Globe, 40th Cong., 2d Sess. 2769 (1868) (statement of Sen. Edmunds). By barring claimants from bringing to the Court of Claims "any claim ... for or in respect to which" a suit against a U.S. officer or agent was pending in another court, the amendment prevented cotton claimants from bringing duplicative claims for compensation for the same confiscated property. *Keene*, 508 U.S. at 206; Peabody 100-101.[2]

b. Since the 1860s, Congress has repeatedly expanded the United States' waiver of sovereign immunity, broadening both the Court of Claims' and the district courts' jurisdiction over claims against the Government, in keeping with the 1863 statute's original aim of rendering prompt justice for claimants injured by government action.

The 1887 Tucker Act expanded the Court of Claims' jurisdiction to encompass "[a]ll claims founded upon the Constitution," as well as statutes, regulations, and contracts. Act of Mar. 3, 1887, ch. 359, §1, 24 Stat.

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[2] Section 8 of the 1868 Act was codified with minor changes as §1067 of the 1878 Revised Statutes, and reenacted without change as §154 of the 1911 Judicial Code. Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087, 1138. In 1948, Congress moved the statute to its present location in Title 28, modernized its language, and expanded the class of suits that trigger its application to include suits "against the United States" as well as officers or agents. Act of June 25, 1948, ch. 646, 62 Stat. 869, 942. Congress made nonsubstantive revisions to §1500 in 1982 when it transferred the trial functions of the Court of Claims to the U.S. Claims Court, Pub. L. No. 97-164, §129, 96 Stat. 25, 49, and in 1992 when it renamed the Claims Court the Court of Federal Claims, Pub. L. No. 102-572, §902(a), 106 Stat. 4506, 4516.

505 (codified as amended at 28 U.S.C. §1491(a)(1)). At the same time, the "Little Tucker Act" granted the district and circuit courts concurrent jurisdiction over such claims "where the amount of the claim does not exceed" $1,000 or $10,000 respectively. *Id.* §2 (codified as amended at 28 U.S.C. §1346(a)(2)). These provisions significantly broadened the Government's waiver of immunity, "'giv[ing] the people of the United States what every civilized nation of the world ha[d] already done—the right to go into the courts to seek redress against the Government for their grievances.'" *Mitchell*, 463 U.S. at 213-214.

In 1946, Congress granted the Court of Claims jurisdiction over Indian tribes' claims against the United States. Act of Aug. 13, 1946, ch. 959, §24, 60 Stat. 1049, 1055-1056 (codified as amended at 28 U.S.C. §1505). The "Indian Tucker Act" granted tribal claimants the same access to the Court of Claims that the Tucker Act had granted individual claimants, giving tribes "'their fair day in court so that they can call the various Government agencies to account on the obligations that the Federal government assumed.'" *Mitchell*, 463 U.S. at 214.

Also in 1946, Congress enacted the Federal Tort Claims Act, which for the first time waived immunity for a broad range of tort claims against the United States and gave the district courts exclusive jurisdiction over those claims. Act of Aug. 2, 1946, ch. 753, 60 Stat. 812, 842 (codified as amended at 28 U.S.C. §§1346(b)(1), 2674).

The Court of Claims' jurisdiction had from the beginning been construed to extend only to claims for money. *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 557 (1962) (plurality). The FTCA likewise authorized the award

only of "money damages." 28 U.S.C. §1346(b)(1). In 1976, however, Congress again expanded the relief available against the United States by amending the Administrative Procedure Act to waive immunity in suits "seeking relief other than money damages." 5 U.S.C. §702. Section 702 gave district courts the power to award equitable relief against the Government in cases otherwise within their jurisdiction.

Accordingly, §1500 now forms part of a complex jurisdictional scheme under which the Government has waived immunity for a wide range of claims for money damages and equitable relief, with some such claims cognizable only in the CFC and some only in the district courts.

2. This case arises out of the Tohono O'odham Nation's attempt to obtain two distinct remedies for two distinct breaches of the Government's fiduciary duties as trustee for the Nation.

For more than a century, the Government has held in trust for the Nation substantial funds and other assets, including approximately 2.9 million acres of land in southern Arizona. Over the years, that land has produced copper, other minerals, sand, and gravel, and trust lands and mineral rights have been leased to third parties. The Nation's trust corpus also includes judgment funds and other monies, including $26 million settling the Nation's claim for the Government's taking of 6.3 million acres of aboriginal lands. Pet. App. 60a-62a, 80a; *Papago Tribe* v. *United States*, 38 Ind. Cl. Comm'n 542, 542-544 (1976).

As trustee, the Government has at least two basic fiduciary obligations. *First*, "[t]he most fundamental fiduciary responsibility of the government ... is the duty to make a full accounting of the property and

funds held in trust." *Misplaced Trust*, H.R. Rep. No. 102-499, at 7 (1992); *see White Mountain Apache Tribe* v. *United States*, 26 Cl. Ct. 446, 448-449 (1992) (describing standards for accounting action brought under Indian Claims Commission). Where a trustee has failed to provide a beneficiary with an adequate accounting, a court may order one as an equitable remedy, requiring the trustee to provide all information about the trust assets necessary to protect the beneficiary's interests. Bogert, *Trusts* §§141-142 (6th ed. 1987).

Second, "[a]part from the duty to account, the Federal Government has a fiduciary duty to 'maximize the trust income by prudent investment,'" *Misplaced Trust* 7 (quoting *Cheyenne-Arapaho Tribes* v. *United States*, 512 F.2d 1390, 1394 (Ct. Cl. 1975)), and to "manage Indian resources so as to generate proceeds for the Indians," *Mitchell*, 463 U.S. at 227. A breach of this separate duty can give rise to a claim for money damages. *Id.* at 226.

The Government's long-standing failure to fulfill those two distinct obligations to tribal trust beneficiaries is well-documented. A 1992 House Report, after surveying the lengthy history of the trusts' management, concluded both that "[t]he Bureau [of Indian Affairs] has failed to accurately account for trust fund moneys" and that "[i]t cannot consistently and prudently invest trust funds." *Misplaced Trust* 56. The 1992 report prompted enactment of the American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. §§4001 *et seq.*, which reaffirmed the Governments' fiduciary duties to tribal beneficiaries. Nonetheless, the Government has yet to remedy the breaches of its fiduciary duties to the Nation.

Accordingly, on December 28 and 29, 2006, the Nation filed two complaints against the United States, the first in the District Court for the District of Columbia and the second in the CFC. Although the complaints contain similar background descriptions of the Government's breaches of its fiduciary obligations to the Nation, they pursue distinct claims for relief for distinct injuries.

As set out more fully below, *infra* Part II.A, the Nation's district court complaint alleges that the Government has failed to provide an adequate accounting. Pet. App. 74a-93a. In addition to related declaratory relief, the complaint seeks "a decree directing the defendants ... to provide a complete, accurate, and adequate accounting of the Nation's trust assets" and "a decree providing for the restatement of the Nation's trust fund account balances in conformity with this accounting, as well as any additional equitable relief that may be appropriate (e.g., disgorgement [or] equitable restitution...)." *Id.* 92a.

The gravamen of the district court complaint is its plea for the equitable remedy of an accounting. To obtain that remedy, the Nation need not demonstrate that the Government has mismanaged its trust assets. Bogert §142. Such a "pre-liability" accounting is purely informational: it would tell the Nation precisely what its trust assets are and describe their condition, including any leases or easements the Government may have granted—important information the Nation does not now have. If the accounting reveals that assets to which the Nation already holds title are not properly recorded in the Government's books, the Nation seeks to have those books corrected through a restatement of its account. The complaint seeks equitable monetary relief only if "appropriate" to give effect to the

accounting and restatement—for instance, if the court deems it appropriate to order the restoration of assets that already belong to the Nation but are missing from the trust.

By contrast, the gravamen of the CFC complaint is a request for "money damages" resulting from the Government's breach of its duty to invest and otherwise manage the Nation's assets prudently—*i.e.*, compensation for returns that should have been earned but were not. Pet. App. 58a-73a. Specifically, the complaint seeks damages arising from the Government's failure to obtain fair market value for leases, permits, and rights-of-way relating to the Nation's land and mineral rights, as well as damages based on the Government's failure to act as a reasonably prudent investor to maximize returns on the funds held in trust for the Nation. *Id.* 67a-73a.

Limitations on each court's ability to grant relief required the Nation to file two complaints to be made whole. The Court of Claims has held that it cannot grant the pre-liability equitable accounting the Nation seeks in the district court. *Klamath & Modoc Tribes* v. *United States*, 174 Ct. Cl. 483, 487-488 (1966). And the district court cannot grant the money damages the Nation seeks in the CFC. 5 U.S.C. §702.

3. The Government moved to dismiss the Nation's CFC complaint under §1500. The CFC granted the motion, concluding that the two complaints arose "from the same operative facts and [sought] the same relief." Pet. App. 55a. Observing that the complaints contained similar descriptions of the suits' historical background, the CFC concluded that the same "background facts" were "relevant" to both suits. *Id.* 49a. The CFC also found "overlap" between the complaints' requests for

relief. *Id.* Although the court stated that it lacked jurisdiction to order a stand-alone pre-liability equitable accounting, it concluded that an "'accounting in aid of judgment'" would be necessary to determine damages once liability had been established. *Id.* 40a, 55a. Finally, the court construed the Nation's prayer in the district court for "appropriate" equitable relief incident to an accounting and restatement to seek the same money damages the Nation sought in the CFC. *Id.* 53a & n.14.

The Court of Appeals reversed. Following its en banc decision in *Loveladies Harbor, Inc.* v. *United States*, 27 F.3d 1545 (Fed. Cir. 1994), the court held that §1500 bars a claim in the CFC only when another pending suit arises from the same operative facts and seeks the same relief. Pet. App. 8a. Without reaching the question whether the Nation's complaints arise from the same operative facts, the court held that §1500 did not apply because the complaints do not seek the same relief. *Id.* 10a-14a.

Specifically, the Court of Appeals held that even if both complaints seek monetary relief, the complaints do not seek the *same* money. *Id.* 12a-14a. In the district court, the Nation requested a restatement of its trust account balances "to correct any errors discovered in the accounting," and equitable restitution or disgorgement incident to that restatement if appropriate—for instance, if an accounting revealed that assets were missing from the trust. *Id.* 13a. The Nation's request for equitable relief in the district court thus encompassed only restoration of money that the Nation already owned, "but that erroneously does not appear in the Nation's accounts." *Id.* By contrast, in the CFC the Nation sought only "'damages for the injuries and losses'" resulting "from the United States' failure to

properly manage the Nation's assets"—compensation for money the Nation never owned, but that a prudent manager would have earned. *Id.*

The court rejected the contention that the relief sought overlapped because each proceeding could involve an "accounting." *Id.* 15a. That the CFC might employ an "accounting in aid of judgment" to ascertain damages if the Nation proved liability, the court held, did not "transform the Nation's unambiguous request for damages into a request for an accounting." *Id.*

The court emphasized that the two suits posed "no risk of double recovery." *Id.* 18a. In the CFC, the Nation sought only "'money' damages—relief that the Nation has not requested in district court, and which the district court is, in any event, powerless to award." *Id.* Conversely, the court noted that "the Court of Federal Claims is powerless to award" the equitable relief sought in the district court complaint. *Id.*

SUMMARY OF ARGUMENT

1. Section 1500 bars CFC jurisdiction over "any claim for or in respect to which the plaintiff ... has pending in any other court any suit or process against the United States." The statute thus requires a determination whether two suits are "'for or in respect to' the same claim." *Keene*, 508 U.S. at 210. As the Court of Claims held long ago, two suits are "for or in respect to" the same "claim" only if they seek the same relief. The CFC and its predecessors have always been courts of limited jurisdiction, and the word "claim" in the Tucker Act and related statutes has always been read to mean a demand for particular relief—money. When §1500 is read *in pari materia* with the remainder of the jurisdictional scheme, it is clear that §1500 likewise

uses "claim" to denote a demand for particular relief. Section 1500 thus applies when two suits seek the same substantive relief, even if on different legal theories or against different defendants.

The Government argues that §1500 applies even to different claims seeking wholly different relief, contending that §1500 turns on the existence of a pending suit "for or in respect to" the CFC claim, and that "in respect to" means "associated [with] in any way." But there is no textual, historical, or purposive reason for reading "in respect to" so broadly. The phrase can have a much narrower sense. *E.g.*, 28 U.S.C. §1292(d)(2) (interlocutory appeal requires "a controlling question of law ... *with respect to* which there is a substantial ground for difference of opinion"). Here, a "suit" "for or in respect to" a "claim" for damages in the CFC is most naturally read to mean a suit seeking recovery *on that specific claim*—not a different, but somehow "associated," claim. The words "in respect to" make clear that a plaintiff may not evade §1500 by bringing the same claim for relief twice on different legal theories. *Keene*, 508 U.S. at 213-214. They do not force a claimant to choose between two different remedies to which he is entitled.

That reading is consistent with §1500's historical origin as a means of preventing cotton claimants from bringing duplicative actions. Such suits were objectionable because they gave claimants two opportunities to seek the same relief: money in return for the same confiscated cotton. It is also consistent with *Keene*, which also addressed multiple suits seeking the same relief: money to compensate Keene for payments made to asbestos claimants.

Indeed, the Court of Claims and its successors have held for over fifty years that §1500 applies only when two suits seek the same relief, reasoning that a suit seeking relief other than money damages is not "for or in respect to" a claim for money damages. And Congress has implicitly ratified that interpretation by making significant amendments to the jurisdictional scheme in 1972 and 1982 without evincing any disagreement with the Court of Claims' holding. *Cf. Keene*, 508 U.S. at 212.

That interpretation is also the only one that avoids working significant injustice. Because (with minor exceptions) the CFC can entertain only claims for money damages, a plaintiff who seeks non-monetary relief is typically forced to seek it in district court. The Government's sweeping interpretation of §1500 as encompassing all suits "associated in any way" with a CFC claim would thus prevent plaintiffs entitled to both monetary and non-monetary relief from obtaining a complete remedy. The injustice is particularly obvious in regulatory takings cases. On the Government's theory, a plaintiff who brought an APA challenge to regulation of his property in district court would have to wait for the district court action to run its course before seeking just compensation in the CFC. If the APA challenge were ultimately rejected, the Tucker Act statute of limitations could well have expired in the interim, depriving the plaintiff of his right to seek just compensation.

Sovereign immunity provides no justification for the Government's surpassingly broad reading of §1500. While waivers of immunity are narrowly construed, there is no question that the Government has waived immunity from claims for money damages arising from breaches of its trust obligations. Section 1500 merely

carves out of the CFC's jurisdiction suits concededly within the waiver if another suit "for or in respect to" the CFC claim is pending. As this Court has repeatedly held regarding other such limitations and conditions on suits against the United States, §1500 should be read not through the lens of "strict construction," but using ordinary tools of statutory interpretation. Here, all of those tools yield the same conclusion: Suits that seek different substantive relief are not "for or in respect to" the same claim under §1500.

II. The Nation's two suits seek different substantive relief. The district court action seeks a pre-liability accounting of the Nation's trust assets. Simply put, the Nation seeks basic information about its trust property that it currently lacks: the metes and bounds of its land, the extent of its mineral rights, the leases and easements the Government has granted with respect to those property rights, the amount of its funds, and the manner in which those funds are invested. The Nation needs that information so that it can intelligently exercise its right to decide who should manage those assets and how. Should the accounting reveal a shortfall—showing that assets belonging to the Nation are not in its trust account—the Nation seeks a restatement of its account balances and appropriate equitable relief incident to the accounting and restatement. In short, the district court action seeks to find out what the Nation *already owns*, to correct the books if the accounting reveals they are in error, and, if appropriate, to restore missing assets to the Nation's account.

In contrast, the CFC complaint seeks money damages in compensation for money the Nation *never owned*, but that the trust would have earned were it not for the Government's mismanagement. Specifically, it seeks money damages flowing from the Gov-

ernment's failure to obtain fair market value for the Nation's rights in its land and to maximize the returns on the funds held in trust for the Nation. Because the district court complaint seeks no such relief, it is not a suit "for or in respect to" the Nation's claim in the CFC.

ARGUMENT

I. Section 1500 Applies Only When A Pending Action Seeks The Same Relief As The Claim Asserted In The CFC

A. The Text And Structure Of The Jurisdictional Scheme Demonstrate That §1500 Applies Only To Claims Seeking The Same Relief

1. Section 1500 provides that the CFC lacks jurisdiction over "any claim for or in respect to which the plaintiff ... has pending in any other court any suit or process against the United States." As *Keene* recognized, §1500 thus poses the question whether two suits are "'for or in respect to' the same claim," and "requires a comparison between the claims raised in the Court of Federal Claims and in the other lawsuit." 508 U.S. at 210.

As *Keene* noted, the word "claim" "can carry a variety of meanings," and, in isolation, does not greatly "illuminate[]" the statutory inquiry. *Id.* Nonetheless, one core meaning of "claim"—in 1868 as now—is "demand for relief." So understood, §1500 bars the CFC from entertaining any demand for relief already sought in another court, just as the Court of Claims has long held.

In the late nineteenth century, this Court observed: "What is a claim against the United States is

well understood. It is a right to demand money from the United States." *Hobbs* v. *McLean*, 117 U.S. 567, 575 (1886). American law dictionaries from the 1860s similarly define "claim" as a demand for a particular kind of relief: a specific thing, act, or sum of money. 1 Bouvier, *A Law Dictionary* 278 (12th ed. 1868) ("[a] challenge of the ownership of a thing which is wrongfully withheld from the possession of the claimant"; "[t]he assertion of a liability to the party making it to do some service or pay a sum of money"); 1 Burrill, *A Law Dictionary and Glossary* 296-297 (2d ed. 1867) ("[a] challenge [or demand] by any man, of the property or ownership of a thing, [or of some interest in it]"; "[a] demand ... made by one person upon another to do or to forbear to do some act or thing as a matter of duty" (brackets in original)); Wharton, *Law Lexicon, or Dictionary of Jurisprudence* 148 (2d ed. 1860) ("a challenge of interest of anything which is in another's possession"). Such contemporaneous sources are entitled to particular weight in construing §1500. *See Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 745 (1996) (consulting Bouvier, Burrill, and Wharton to construe "interest" in 1864 National Bank Act).

In modern usage, "claim" continues to mean "demand for relief" in many contexts. This Court's Article III standing decisions, for instance, require a plaintiff to "demonstrate standing for each *claim* he seeks to press"—that is, to establish standing separately for "'each *form of relief* sought'"—even when "all claims for relief derive from a 'common nucleus of operative fact.'" *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 352 (2006) (emphases added). True, in *Los Angeles* v. *Lyons*, the Court held that the plaintiff had standing to pursue a "*claim for damages*" arising out of the defendants' use of a police chokehold, but lacked standing to

pursue an "injunctive *claim*" challenging the same practice. 461 U.S. 95, 109 (1983) (emphases added). As these cases demonstrate, a "claim" frequently connotes a demand for particular relief, distinct from the set of facts giving rise to it and from related claims arising from those facts.[3]

When §1500 is read, as it must be, in the context of the overall jurisdictional scheme of which it is a part, it is clear that §1500 uses "claim" in that ordinary sense of a demand for particular relief. "[C]ourts do not interpret statutes in isolation, but in the context of the *corpus juris* of which they are a part, including later-enacted statutes." *Branch* v. *Smith*, 538 U.S. 254, 281

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[3] *See also Black's Law Dictionary* 282 (9th ed. 2009) (defining "claim," *inter alia*, as "[a] demand for money, property, or a legal remedy to which one asserts a right", "an interest or remedy recognized at law"). "Claim" may, of course, have other meanings in other contexts. In the modern parlance of claim preclusion, for example, "claim" may refer to "[t]he aggregate of operative facts giving rise to a right enforceable by a court." *Id.* at 281; *see Restatement (Second) of Judgments* §24 cmt. a (1982). This broader definition of "claim," and the modern understanding of claim preclusion with which it is associated, did not gain currency until well after the enactment of §1500's predecessor, *see id.*; 18 Wright & Miller, *Federal Practice and Procedure* §4407 (2d ed. 2002), and the definition does not appear in legal dictionaries of the period; it was not added to *Black's* until 1989. Counts in a complaint asserting different legal bases for relief are also often referred to as "claims." *E.g.*, *Moseley* v. *V Secret Catalogue, Inc.*, 537 U.S. 418, 423-424 (2003) (complaint "contained four separate claims" alleging different theories of trademark infringement and unfair competition). Neither meaning readily fits the historical origin and broader statutory context of §1500. Indeed, in *Keene*, this Court rejected both the argument that "claim" in §1500 imports claim-splitting doctrine and the notion that it connotes a particular legal theory for relief. 508 U.S. at 213-214.

(2003) (plurality). Because §1500 carves out a subset of "claims" that would otherwise be within the CFC's jurisdiction, the word "claim" in §1500 must be read *in pari materia* with the remainder of the jurisdictional scheme. *Smith* v. *City of Jackson*, 544 U.S. 228, 233 (2005) (plurality) ("[W]hen Congress uses the same language in two statutes having similar purposes, ... it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."); *United States* v. *Freeman*, 44 U.S. (3 How.) 556, 564-565 (1845). Since the court's inception, the "claims" over which the Court of Claims has jurisdiction have been read to mean demands for particular relief—namely, money.

Both the 1855 and 1863 Acts granted the Court of Claims jurisdiction over "claims" against the United States "founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States." 1855 Act §1, 10 Stat. 612; 1863 Act §2, 12 Stat. 765. Although neither statute expressly limited the relief available to money damages, this Court held that the statute permitted the Court of Claims to entertain only "claims" for money. *United States* v. *Alire*, 73 U.S. (6 Wall.) 573, 576 (1868) (Court of Claims' jurisdiction is "confine[d] ... to cases in which the petitioner sets up a moneyed demand ... from the government"). When Congress enacted §1500's predecessor, therefore, it was already clear that, when used to define the Court of Claims' jurisdiction, "claim" meant a demand for money.

The Tucker Act and Little Tucker Act confirmed this reading. Like its predecessors, the Tucker Act gave the Court of Claims jurisdiction over certain "claims" against the United States. 1887 Act §1, 24

Stat. 505. This Court interpreted the Tucker Act to incorporate the same limitation as its predecessors, holding that, in "the context of the statute," "claims" "may be claims for money only." *United States* v. *Jones*, 131 U.S. 1, 17 (1889). The Little Tucker Act made it even clearer that a "claim" is a demand for money by granting the district courts concurrent jurisdiction "where *the amount of the claim* does not exceed one thousand dollars." 1887 Act §2, 24 Stat. 505 (emphasis added). As *Jones* noted, "[t]his language is properly applicable only to a money claim." 131 U.S. at 19. That historical limitation on the word "claim" still informs the Tucker Act today. *Overall Roofing & Constr. Inc.* v. *United States*, 929 F.2d 687, 689 (Fed. Cir. 1991) ("[T]he word 'claim' carries with it the historical limitation that it must assert a right to presently due money.").[4]

The CFC has thus always been a court of specific and limited jurisdiction –jurisdiction limited not only by subject-matter, but by the kind of relief a plaintiff may seek. Section 1500 must be construed against that backdrop. As the en banc Federal Circuit observed in *Loveladies*: "[U]sing differing relief as a characteristic for distinguishing claims [is] especially appropriate here, because the Court of Federal Claims and its

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[4] More recently, Congress has empowered the CFC to grant certain equitable relief in limited circumstances. 28 U.S.C. §1491(a)(2) (court may "direct[] restoration to office," "placement in appropriate duty ... status," and "correction of applicable records" "as an incident of and collateral to" a money judgment). Except in bid-protest cases, *id.* §1491(b)(2), however, the CFC may still grant equitable relief only incidental to a money judgment. *National Air Traffic Controllers Ass'n* v. *United States*, 160 F.3d 714, 716 (Fed. Cir. 1998).

predecessors have been courts with limited authority to grant relief." 27 F.3d at 1550.

In short, the term "claim" in §1500, as in the remainder of the jurisdictional scheme, necessarily alludes to the particular relief sought. And because §1500 applies only when two suits are "'for or in respect to' the same claim," *Keene*, 508 U.S. at 210, §1500 bars a suit in the CFC only when an action pending in another court seeks the same substantive relief.

2. The Government contends (Br. 16) that §1500 cannot turn on the relief sought because the word "relief" is not in the statute. That misses the point. As demonstrated above, the word "claim" refers to a demand for particular relief.

Rather than addressing the meaning of the key term "claim," the Government relies almost entirely on its construction of the phrase "in respect to," read in isolation from the rest of the statute. It argues (Br. 21) that §1500 precludes CFC jurisdiction even "where the plaintiff's two suits involve *different* claims, so long [as] the suit in the other court is a suit 'in respect to' the plaintiff's claim in the CFC." And it contends (*id.*) that "in respect to" must be read to mean "associated [with] in any way."

That position cannot be squared with *Keene*'s recognition that §1500 "preclud[es] jurisdiction over the claim of a plaintiff with a suit pending in another court 'for or in respect to' *the same claim*," and that the statute "requires a comparison between the claims raised in the Court of Federal Claims and in the other lawsuit." 508 U.S. at 210 (emphasis added).

Moreover, the Government's argument fails even on its own terms. "In respect to" has no one fixed

meaning, and does not necessarily mean "associated [with] in any way," however remote. The Government offers no textual, contextual, or purposive justification for such a broad reading of the phrase—it merely asserts that the words "in respect to," standing alone, mandate the most expansive possible reading.

Just as with all statutory language, however, the phrase "in respect to" must be read in context. Indeed, the very decision upon which the Government relies (Br. 21-22) recognized and applied that common-sense principle. *Kosak* v. *United States*, 465 U.S. 848, 853-861 (1984) (while the Court's interpretation was not "ineluctable," reading "arising in respect of" to mean "arising out of" best comported with the statute's structure and purpose).

This Court employed a similar analysis when construing the phrase "relate to" in the preemption clause of ERISA. *N.Y. State Conf. of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645 (1995). The Court observed that "[i]f 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for '[r]eally, universally, relations stop nowhere.'" *Id.* at 655. It therefore "look[ed] ... to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive," *id.* at 656, and concluded that the state law in question did not "relate to" a plan under ERISA, even though the law affected insurance coverage choices made by plans, *id.* at 649, 659.

As with the phrase "relate to" in ERISA, reading "in respect to" in §1500 "to extend to the furthest stretch of its indeterminacy" results in an unnatural and strained reading of the statute far removed from

the narrow circumstances that prompted its enactment. Moreover, because the Government's reading "stop[s] nowhere," it admits of no limiting principle that would enable the CFC to discern when it has jurisdiction over a claim. As the Government acknowledges (Br. 45), "'jurisdictional rules should be clear.'" Yet it offers a "rule" that is rife with uncertainty.

Nor is the Government's construction the more natural reading of the statutory text. "In respect to" frequently signifies something far narrower than "associated [with] in any way." Within the Judiciary Code, for example, §1292(d)(2)'s provision for interlocutory appeals from the CFC requires the judge to issue "a statement that a controlling question of law is involved *with respect to* which there is a substantial ground for difference of opinion" (emphasis added). In that context, "with respect to" (a synonym for "in respect to") surely cannot mean "associated with in any way." Rather, a substantial ground for difference of opinion "with respect to" a controlling question of law means a ground for difference of opinion *as to that specific question of law*—not a different, even if related, question. *AD Global Fund, LLC* v. *United States*, 68 Fed. Cl. 663, 665 (2005). Similarly, it is far more natural to read §1500's reference to a "suit" "for or in respect to" a "claim" as this Court read it in *Keene*, to mean a suit seeking to recover *on that specific claim*, not on a different, but somehow "related," claim.

Giving the phrase "in respect to" that more natural construction still allows it a significant function in the statute. As *Keene* explained, "in respect to" clarifies that the statute extends beyond literally identical claims to encompass claims seeking the same substantive relief, but pled on different legal theories or against different federal defendants. 508 U.S. at 213.

3. Finally, the Government contends (Br. 22) that §1500 must be read broadly because "its jurisdictional bar is triggered by '*any* suit or process.'" But the word "any" does not help the Government. It simply means that every pending proceeding that is a "suit or process" "for or in respect to" a "claim" will bar CFC jurisdiction over that claim. The word "any" does nothing to answer the question at issue here—*which* suits are "for or in respect to" a particular claim. As to that question, the Government's position cannot be sustained.

B. The Statute's History And Purpose Support Reading §1500 To Bar Only Suits Seeking The Same Relief

Congress enacted §1500 to prevent claimants from pursuing two suits, one against the United States and one against a U.S. officer or agent, seeking the same relief for the same injury: monetary compensation for their confiscated cotton. As this Court put it, the statute's "declared purpose ... was only to require an election between a suit in the Court of Claims and one brought in another court against an agent of the government in which the judgment would not be *res adjudicata*." *Matson*, 284 U.S. at 355-356. That is, §1500 "was intended to force an election *where both forums could grant the same relief*, arising from the same operative facts." *Johns-Manville Corp.* v. *United States*, 855 F.2d 1556, 1564 (Fed. Cir. 1988) (en banc) (emphasis added).

The Government argues (Br. 28-31) that §1500 cannot be so limited because the cotton claimants themselves sought "different" relief in their two suits. According to the Government, the Court of Claims suits were "statutory proceeding[s] to distribute a specific [trust] corpus," while the other suits were tort suits

seeking damages from an individual defendant. But this demonstrates only that the cotton claimants' suits proceeded on different legal theories, *Keene*, 508 U.S. at 212-214, not that they sought different relief. To the contrary, the cotton claimants' suits were "duplicative," *id.* at 206, because they sought the same relief—monetary compensation for the same lost cotton—albeit on different theories and from different defendants.[5]

The Government also argues (Br. 29-31) that the scope of relief available differed in the two fora: A tort suit could recover full compensatory damages, while a suit under CAPA could recover only the sale proceeds, less expenses, held in trust by the Treasury. In fact, the relief available under the tort theories the cotton claimants typically pursued often did not differ greatly from that available under CAPA.[6] More importantly, this argument, too, misses the point: Even if the amount of, or method of calculating, the monetary

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[5] The Government similarly contends (Br. 23-24) that §1500 forces a choice between different types of relief because it forced the cotton claimants to choose between defendants. But two suits can seek the same relief even if brought against different defendants. In the case of the cotton claimants, while the legal basis for relief might have differed depending on the defendant, the substantive relief—money for seized cotton—was the same. Likewise, §1500's bar against duplicative suits by a plaintiff and his assignee (*see* Br. 24) merely confirms that §1500 turns on the substantive relief sought, not the parties to the action.

[6] *Compare* CAPA §3, 12 Stat. 820 (damages are "residue of [sale] proceeds, after the deduction of [expenses]"), *with E.E. Bolles Wooden Ware Co.* v. *United States*, 106 U.S. 432, 434 (1882) ("weight of authority" dictates that where conversion is not willful, damages are market value less defendant's expenses in bringing property to market).

award might differ, the damages recoverable in tort and the proceeds recoverable under CAPA were duplicative remedies for the same injury. Section 1500 was addressed to that situation, not to a claimant seeking different, non-duplicative relief in two fora.

Nor is construing §1500 to prohibit only suits seeking the same relief inconsistent with this Court's holding or reasoning in *Keene*, as the Government contends (Br. 33-35). Keene's multiple suits sought the same remedy for the same loss: compensation from the United States for amounts Keene paid to asbestos plaintiffs. 508 U.S. at 203-204. As this Court recognized, *Keene* thus did not present the question whether §1500 bars suits seeking different relief. *Id.* at 212 n.6. Instead, this Court considered whether claims seeking the same relief for the same injury constituted "the same claim" for purposes of §1500 if they were premised on different legal theories. *Id.* at 211-214. In holding that Keene's claims were the same, this Court relied on the original aim of §1500—barring cotton claimants from seeking money compensation for the same cotton based on different legal theories in different courts. *Id.* at 213-214. It also relied on Court of Claims precedent holding that different legal theories did not render claims different for purposes of §1500. *Id.* at 211-212 (citing *British Am. Tobacco Co.* v. *United States*, 89 Ct. Cl. 438 (1939)). Here, both the history and purpose of §1500 and the Court of Claims' long-standing precedent support the conclusion that §1500 does not bar claims for different relief.

C. The Court Of Claims And Its Successors Have Held That §1500 Applies Only To Claims For The Same Relief, And Congress Has Implicitly Ratified That Interpretation

For over fifty years, the Court of Claims and its successors have construed "claim" in §1500 to mean a demand for particular relief. They have thus understood suits seeking *different relief* to be suits "for or in respect to" *different claims*, unaffected by §1500. As *Keene* recognized, 508 U.S. at 210-213, such a well-established judicial interpretation of §1500 is compelling evidence of the statute's meaning, especially where—as here—Congress has since overhauled the statutory scheme without disturbing the court's holding.

The Court of Claims first addressed the question in its 1956 *Casman* decision. Casman alleged that he had been illegally removed from his government job. He sued in the Court of Claims for back pay (money damages that a district court could not grant) and in district court for reinstatement (equitable relief that, at the time, the Court of Claims could not grant). The Court of Claims held that §1500 did not apply because the district court suit was not "for or in respect to" the plaintiff's claim for back pay in the Court of Claims. 135 Ct. Cl. at 650. "To hold otherwise would be to say to plaintiff, 'If you want your job back you must forget your back pay'; conversely, 'If you want your back pay, you cannot have your job back.' Certainly that is not the language of the statute or the intent of Congress." *Id.*

The Government rejects that common-sense conclusion, contending (Br. 33) that "*Casman* did not purport to interpret Section 1500's statutory text," but "'overr[ode] the words of the section'" based on equitable considerations. To the contrary, "*Casman* and its

progeny reflect a carefully considered interpretation of the statutory term 'claims.'" *Loveladies*, 27 F.3d at 1551. While *Casman* did point out the inequities attendant on the Government's interpretation, it rested its holding on "the language of the statute," understood in light of the statute's history and purpose. 135 Ct. Cl. at 650. The court reasoned that a suit "for or in respect to" a claim is a suit seeking the same relief: "The claim in this case and the relief sought in the district court are entirely different.... Plaintiff does not have pending in any other court a suit 'for or in respect to' his claim for back pay within the meaning of section 1500[.]" *Id.* at 649-650.

The Court of Claims and its successors have "consistently applied" *Casman*'s reading of §1500. *Loveladies*, 27 F.3d at 1550; *see also, e.g.*, *Boston Five Cents Sav. Bank, FSB* v. *United States*, 864 F.2d 137, 139 (Fed. Cir. 1988) ("because different types of relief are sought" in each forum, §1500 does not apply); *Truckee-Carson Irrigation Dist.* v. *United States*, 223 Ct. Cl. 684, 685 (1980) ("It is settled law that §1500 does not bar a proceeding in this court, asking monetary relief, if the other pending suit seeks only affirmative relief such as an injunction or a declaratory judgment."); *Allied Materials & Equip. Co.* v. *United States*, 210 Ct. Cl. 714, 716 (1976).[7]

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[7] By contrast, courts have held that §1500 barred suits in the CFC where plaintiffs sought duplicative relief, even if on different legal theories. *In re Skinner & Eddy Corp.*, 265 U.S. 86, 95 (1924) (two suits seeking damages for cancellation of same ship-building contracts); *Corona Coal Co.* v. *United States*, 263 U.S. 537, 539-540 (1924) (two suits seeking compensation for Government's alleged underpayment for same coal); *British Am. Tobacco*, 89 Ct. Cl. at 439-440 (two suits on "same claim" for "recovery of the same amount for the same gold bullion").

The lone aberration in this history is *UNR Industries, Inc.* v. *United States*, 962 F.2d 1013 (Fed. Cir. 1992) (en banc), which purported to reject *Casman* in dicta. This Court declined to endorse *UNR*'s dicta in *Keene*, 508 U.S. at 212 n.6, and it was repudiated by the en banc Federal Circuit just two years later in *Loveladies*, which carefully considered and reaffirmed the validity of the *Casman* rule. 27 F.3d at 1548-1549.

In *Loveladies*, owners of wetlands challenged the Army Corps of Engineers' denial of a fill permit in district court under the APA. While that suit was pending, plaintiffs sued in the CFC seeking just compensation for the Corps' alleged taking of their property. The Federal Circuit held that §1500 did not bar the CFC action because the two suits did not seek the same relief. 27 F.3d at 1548-1551. The court rejected the Government's plea that it "overturn longstanding precedent and adopt ... a new definition of 'claims'" under which "claims" are the same whenever they arise from the same "operative facts," "regardless of the type of relief sought." *Id.* at 1552. It noted that such an interpretation of §1500 could "force plaintiffs to forego monetary claims in order to challenge the validity of Government action" or "preclude challenges to the validity of Government action in order to protect a Constitutional claim for compensation." *Id.* at 1556. The court concluded that nothing in §1500's language or history warranted extending it to suits that seek different relief, preventing plaintiffs from obtaining the complete relief to which they are entitled. *Id.*

Congress has implicitly ratified that holding. This Court presumes that Congress is "aware of ... earlier judicial interpretations and, in effect, adopt[s] them" when it reenacts or amends a statute without relevant change. *Keene*, 508 U.S. at 212; *see Lorillard* v. *Pons*,

434 U.S. 575, 580-581 (1978). "[T]he claim to adhere to case law is generally powerful once a decision has settled statutory meaning," particularly when many years have passed since the relevant judicial decision "without any action by Congress to modify the statute." *Shepard* v. *United States*, 544 U.S. 13, 23 (2005). *Keene* recognized and applied this principle to §1500, holding that Congress's reenactment of §1500's "claim for or in respect to which" language following the Court of Claims' decision in *British American Tobacco* evinced an implicit adoption of that case's interpretation of §1500. 508 U.S. at 212.

The same is true here. Congress has amended §1500 and the Tucker Act on several occasions since *Casman*, without ever suggesting any disagreement with *Casman*'s holding. In 1972, for example, Congress took action to address wrongful discharge claims like that in *Casman*. Rather than amend §1500 to reverse or narrow *Casman*'s holding, Congress amended the Tucker Act to authorize the Court of Claims to award reinstatement in addition to back pay. Pub. L. No. 92-415, §1, 86 Stat. 652 (codified at 28 U.S.C. §1491(a)(2)). As the Senate Report explained, "limits on the remedies available in the Court of Claims impose[d] unwarranted burdens on the litigant," for whom it was "necessary ... to file an additional suit in a Federal district court to obtain reinstatement." S. Rep. No. 92-1066, at 2 (1972). The amendment was required to allow such plaintiffs "to obtain all necessary relief in one action." *Id.* at 1.

In 1982, moreover, Congress undertook a wholesale restructuring of the Court of Claims and its jurisdiction in the Federal Courts Improvement Act. Pub. L. No. 97-164, 96 Stat. 25. The FCIA transferred the appellate functions of the Court of Claims to the newly-

created Court of Appeals for the Federal Circuit, and created the United States Claims Court—now the CFC—to inherit the Court of Claims' trial jurisdiction. *Mitchell*, 463 U.S. at 228 n.33. Even as it overhauled the entire jurisdictional scheme, however, Congress made no substantive change to §1500. Had Congress wanted to correct the settled judicial interpretation of §1500, it surely would have done so then. Because it did not, as *Keene* recognized, the reasonable inference is that Congress was aware of the longstanding interpretation of §1500 and chose not to disturb it.

D. The Government's Reading Of §1500 Would Lead to Absurd And Unjust Results

The Government's construction of §1500 would lead to absurd and inequitable consequences that could not have been contemplated by the Congress that originally enacted the statute and that threaten to undermine the central purpose of the jurisdictional scheme. Such interpretations "are to be avoided if alternative interpretations consistent with the legislative purpose are available," as is true here. *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982).

In particular, the Government's proposed rule would make it impossible for plaintiffs simultaneously to pursue injunctive or other equitable relief from ongoing governmental wrongdoing and money damages for past wrongs. Plaintiffs would be forced to relinquish one remedy or the other, or else to gamble that the first suit will be finally decided before expiration of the limitations period on the other.

Casman and *Loveladies*—both of which the Government asks this Court to overrule—illustrate the point. In *Casman*, the plaintiff's wrongful discharge, if

proven, would have entitled him to both reinstatement and back pay—but he could obtain reinstatement only in district court and back pay only in the Court of Claims. 135 Ct. Cl. at 650. On the Government's theory, §1500 would have required Casman to litigate his claim for reinstatement, including all appeals, to conclusion before he could sue for back pay in the Court of Claims. By that time, however, the Tucker Act statute of limitations could well have run, and because equitable tolling is unavailable in the Tucker Act context, *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 134-139 (2008), Casman would have lost his claim to back pay. Alternatively, to preserve his back-pay claim, Casman would have had to defer or abandon his claim for reinstatement. As the Court of Claims put it: "'If you want your job back you must forget your back pay'; conversely, 'If you want your back pay, you cannot have your job back.'" 135 Ct. Cl. at 650.

Similarly, in *Loveladies*, the plaintiff sought to have agency action set aside under the APA while preserving its ability, in the event the agency action was held valid, to pursue a claim that the action was a taking requiring just compensation. Because only a district court could grant the APA relief Loveladies sought, and only the CFC could order just compensation for a taking, Loveladies was required to proceed in two different courts. Under the Government's view of §1500, Loveladies would have been forced to choose between challenging the legality of the Government's action under the APA and running the risk that the Tucker Act statute of limitations would expire during that litigation, or forgoing its APA challenge to preserve its constitutional entitlement to just compensation. 27 F.3d at 1548-1551. If this Court adopts the Government's view, all regulatory takings plaintiffs who want to challenge

the legality of the Government's conduct will face the same unjust dilemma.

Likewise, in this case, the Nation would be forced to defer or relinquish either its claim to a full pre-liability accounting—an equitable remedy that the Court of Claims has held it cannot grant, *Klamath & Modoc*, 174 Ct. Cl. at 487-488—or its claim to money damages for the Government's mismanagement of its assets—a remedy available only in the CFC, 5 U.S.C. §702.

When §1500 was enacted, its avowed purpose was to require plaintiffs in a discrete class of cases to elect a single forum in which to pursue a money judgment for a single injury. The Government would transform §1500 into a sweeping rule requiring plaintiffs in a large class of cases to elect a single *remedy* even if they require — and would otherwise be entitled to—additional relief to be made whole. That reading of §1500 not only goes far beyond the provision's original purpose, but undermines the principal goal of the multiple statutes enacted since 1868 expanding courts' jurisdiction to award both money damages and equitable relief against the Government.

The Government does not deny that such a result would be anomalous as well as inequitable. Rather, it argues (Br. 5) that courts are not free to engraft an "'exception'" on a statute to "'remove apparent hardship.'" Reading §1500 not to bar plaintiffs from obtaining complete relief does not create an "exception" to the statute, however. Rather, it construes §1500's text according to its ordinary meaning, so as not to thwart Congress's plain design to permit recovery of both money damages and equitable remedies.

The Government contends (Br. 48) that such a reading of §1500 will result in burdensome and duplicative litigation. When a litigant must proceed in two fora to obtain complete relief, however, courts can and do avoid duplicative proceedings by staying one suit while the other goes forward. *Landis* v. *North Am. Co.*, 299 U.S. 248, 254-255 (1936); *Eastern Shawnee Tribe* v. *United States*, 582 F.3d 1306, 1311 (Fed. Cir. 2009) ("the government's interest in avoiding duplicative proceedings" may be addressed by a stay); *Loveladies*, 27 F.3d at 1547 (CFC action stayed pending district court proceeding); *Boston Five Cents*, 864 F.2d at 140 (same). Such an approach would impose little more burden, if any, on the Government than a plaintiff's commencing a CFC suit after his district court suit ends, which the Government admits (Br. 35 n.7) is permissible. In the latter case, however, the statute of limitations would likely extinguish many plaintiffs' CFC claims before they could be brought.

The Government also contends (Br. 41-42) that §1500 should not be read to focus on the relief a plaintiff seeks because it may differ from the relief eventually awarded: "A court ... may grant legal damages even if a complaint seeks only equitable relief (and vice versa)." But that is not true in suits against the United States, where, except in tort suits, only the CFC may grant money damages over $10,000, and where only the district courts may grant most forms of equitable relief. A plaintiff seeking both money damages and equitable relief generally will not have the option of bringing all its claims for relief in one court. The Government's claim that, if this Court approves the Court of Appeals' view of §1500, plaintiffs will engage in "strategic manipulation of the pleading process" (Br. 42) is thus entirely unfounded.

E. Sovereign Immunity Principles Do Not Warrant Reading §1500 To Bar Claimants From Obtaining Complete Relief

The Government relies most heavily on its argument (Br. 24-28) that principles of sovereign immunity require its sweeping reading of §1500. But while this Court will not read a statute to waive sovereign immunity unless it is clear that Congress so intended, that canon has no application here.

It is undisputed that the Government has waived its sovereign immunity for suits, like this one, for money damages stemming from breach of its trust obligations to Indian tribes. 28 U.S.C. §§1491, 1505; *Mitchell*, 463 U.S. at 212-216. "If a claim falls within the terms of the Tucker Act, the United States has presumptively consented to suit." *Id.* at 216. Once the existence of a waiver of immunity has been established, the clear-statement rule of statutory interpretation designed to ensure that Congress does not unknowingly subject the Government to suit is no longer necessary. "'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'" *Block* v. *Neal*, 460 U.S. 289, 298 (1983).[8]

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[8] By contrast, the decisions on which the Government relies (Br. 25) address the threshold question whether the United States has waived its immunity for a particular cause of action or remedy. *Department of Army* v. *Blue Fox, Inc.*, 525 U.S. 255 (1999) (waiver in 5 U.S.C. §702); *United States* v. *Williams*, 514 U.S. 527 (1995) (waiver for tax-refund suits in 28 U.S.C. §1346(a)(1)); *United States* v. *Nordic Village, Inc.*, 503 U.S. 30 (1992) (waiver for suits seeking monetary relief in 11 U.S.C. §106(c)); *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654 (1947) (waiver for suits seeking

This Court has thus repeatedly rejected the argument, analogous to the Government's argument here, that the exceptions to the waiver of sovereign immunity in the FTCA must be broadly construed because they "confine[] the scope" (Br. 25) of the Government's consent to suit. Rather, "the proper objective of a court attempting to construe one of the [exceptions] is to identify 'those circumstances which are within the words and reason of the exception'—no less and no more." *Kosak*, 465 U.S. at 853-854 n.9; *see United States* v. *Yellow Cab Co.*, 340 U.S. 543, 548 n.5 (1951) ("'Where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well defined exceptions, resort to th[e] rule (of strict construction) cannot be had in order to enlarge the exceptions.'").

In *Dolan* v. *USPS*, for instance, this Court held that the exception to the FTCA waiver for "loss, miscarriage, or negligent transmission of letters or postal matter," 28 U.S.C. §2680(b), did not bar a suit for injuries sustained by tripping on a package. 546 U.S. 481, 483 (1996). The Court recognized that "[i]f considered in isolation, the phrase 'negligent transmission' could

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interest on unpaid claims in 28 U.S.C. §2516); *Lehman* v. *Nakshian*, 453 U.S. 156 (1981) (consent to jury trial under ADEA). In such cases, this Court has applied a rule of strict construction to avoid "enlarg[ing]" a waiver of immunity beyond the scope Congress clearly intended. *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685-686 (1983); *see Lane* v. *Peña*, 518 U.S. 187, 192 (1996) ("waiver of sovereign immunity must extend unambiguously to ... monetary claims" to support money damages award). Because the Government has unambiguously waived immunity from claims for money damages for breach of its trust duties, *Mitchell*, 463 U.S. at 212, those decisions are not relevant here.

embrace ... creation of slip-and-fall hazards," but rejected that reading as inconsistent with "the purpose and context of the statute." *Id.* at 486. The Court explained that "this case does not implicate the general rule that 'a waiver of the Government's sovereign immunity will be strictly construed.'" *Id.* at 491. "[I]n the FTCA context, ... 'unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute,' which 'waives the Government's immunity from suit in sweeping language.'" *Id.* at 492 (citation omitted).

The same analysis is appropriate here. Like the FTCA, the Tucker Act and Indian Tucker Act "'waive[] the Government's immunity from suit in sweeping language.'" Their broad purpose is to fulfill "'the duty of Government to render prompt justice against itself'" by "'giv[ing] the people of the United States ... the right to go into the courts to seek redress against the Government for their grievances.'" *Mitchell*, 463 U.S. at 213-214. Reading §1500 to create the broad exception the Government urges would "'run the risk of defeating th[at] central purpose,'" *Dolan*, 546 U.S. at 492, by denying plaintiffs the ability to obtain the complete relief to which Congress entitled them.

That conclusion is still more appropriate because §1500 is not even an "exception" to the Tucker Act waiver for certain types of claims or certain relief. Section 1500 alters neither the substantive scope of the claims as to which the Tucker Act consents to suit nor the remedy (money damages) to which the Government has agreed to subject itself. It merely carves out of the CFC's jurisdiction suits concededly within the Tucker Act waiver if another suit "for or in respect to" the CFC claim is pending.

As this Court has recognized in similar circumstances, once the Government has waived its immunity, the canon of strict construction does not apply to every rule of jurisdiction or procedure governing the resulting litigation. In *Franconia Associates* v. *United States*, 536 U.S. 129 (2002), for example, this Court addressed the question whether the Tucker Act statute of limitations, 28 U.S.C. §2501, should be construed narrowly in favor of the Government. The Court unanimously rejected the Government's construction of the statute as an "'unduly restrictive' reading of the congressional waiver of sovereign immunity, rather than a 'realistic assessment of legislative intent.'" 536 U.S. at 145; *see also Scarborough* v. *Principi*, 541 U.S. 401, 421 (2004) (although Equal Access to Justice Act waives immunity from awards of attorneys' fees, time limitation on fee application is not strictly construed); *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 94-96 (1990) (declining to construe Title VII statute of limitations narrowly in Government's favor where waiver of immunity was clear); *Mitchell*, 463 U.S. at 218-219 (where Tucker Act has waived immunity, statutes creating substantive right to money damages should not "be construed in the manner appropriate to waivers of sovereign immunity").

In any event, even where the canon of strict construction does apply, it does not justify adopting an interpretation that is implausible in light of text, precedent, and legislative purpose. *United States* v. *Idaho*, 508 U.S. 1, 7 (1993) ("[J]ust as 'we should not take it upon ourselves to extend the waiver beyond that which Congress intended,'" neither "'should we assume the authority to narrow the waiver that Congress intended.'"); *United States* v. *Williams*, 514 U.S. 527, 532-536 (1995) (applying canon of strict construction to interpret waiver

of immunity, but rejecting Government's "strained reading" of the statute in part because it "would leave people in [plaintiff's] position without a remedy"); *id.* at 541 (Scalia, J., concurring) (clear-statement rule does not "require explicit waivers [of immunity] to be given a meaning that is implausible"). The sovereign-immunity canon is but one "tool for interpreting the law, and [this Court] ha[s] never held that it displaces the other traditional tools of statutory construction." *Richlin Sec. Serv. Co.* v. *Chertoff*, 128 S. Ct. 2007, 2019 (2008). Where, as here, the "traditional tools of statutory construction and considerations of stare decisis" point clearly to a particular interpretation of a statute, the canon of strict construction cannot defeat that result. *Id.*

F. The *Tecon* Rule Is Not Before This Court

Finally, the Government's attack (Br. 36-39) on the order-of-filing rule announced in *Tecon Engineers, Inc.* v. *United States*, 343 F.2d 943 (Ct. Cl. 1965), is not properly before this Court. *Tecon* held that, because §1500 applies only when another suit on the same claim is "pending," a district court suit filed *after* a Court of Claims suit has been initiated does not strip the Court of Claims of jurisdiction. *Id.* at 949. As the Government admits (Br. 37 n.8), because the Nation filed its district court suit *before* its CFC suit, the *Tecon* rule "does not directly apply to this case." This Court does not render advisory opinions on questions not presented by the facts of the case before it. *Clinton* v. *Jones*, 520 U.S. 681, 700 & n.33 (1997); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

The Government contends that this Court should nonetheless overrule *Tecon* because it formed part of the Court of Appeals' "*ratio decidendi*." To the contrary,

the Court of Appeals simply applied the construction of §1500 it had already articulated in *Casman* and *Loveladies*, mentioning *Tecon* only in response to the Government's argument that letting the Nation's suit go forward would be bad policy. The *Tecon* rule did not—nor could it—form any part of the Court of Appeals' holding. And it is well-established that this Court "reviews judgments, not statements in opinions." *Black* v. *Cutter Labs.*, 351 U.S. 292, 297-298 (1956). As in *Keene*, 508 U.S. at 216, this Court should reject the Government's invitation to reach out to decide a question that is not presented and whose answer has no bearing on the proper outcome of this case.

II. Because Each Of The Nation's Suits Seeks Different Relief, Section 1500 Does Not Bar The Nation's CFC Action

A. Each Complaint Seeks Different Relief To Redress A Different Breach Of Trust

1. Because the Nation's two complaints seek distinct relief to redress distinct breaches of trust, §1500 does not bar the Nation's CFC suit.

In the district court, the Nation seeks a full preliability accounting of the Nation's trust assets, restatement of its accounts, and, if appropriate, other equitable relief incident to the accounting and restatement. Although the complaint recites a number of other breaches of fiduciary duties by way of background, its unmistakable focus is the Government's breach of its duty to provide an accounting.

Count I alleges that the Government has a "duty to provide the Nation with a complete, accurate, and adequate accounting of all property held in trust by the United States for the Nation's benefit," that the

Government has failed to provide such an accounting, and that the Nation is entitled to a declaration delineating the Government's fiduciary duties and declaring that they have been breached. Pet. App. 89a-90a. Count II alleges an entitlement to injunctive relief ordering a complete accounting of all trust assets, restatement of the Nation's trust fund balances in conformity with the accounting, and "any additional equitable relief that may be appropriate (e.g., disgorgement [or] equitable restitution...)," along with an order directing the Government to bring itself into compliance with its fiduciary obligations. *Id.* 91a.

The prayer for relief accordingly requests (1) a declaration "construing the [Government's] trust obligations ..., including, but not limited to, the duty to provide a complete, accurate, and adequate accounting of all trust assets"; (2) a declaration that the Government is "in breach of its trust obligations," including "its fiduciary duty to provide a complete, accurate, and adequate accounting"; (3) a declaration that reports the Government has provided to date "do not constitute the complete, accurate, and adequate accounting that the defendants are obligated to provide"; (4) a declaration "delineating the [Government's] fiduciary duties ... with respect to the management and administration of the trust assets"; (5) an order "directing the defendants ... to provide a complete, accurate, and adequate accounting of the Nation's trust assets, including, but not limited to, funds under the custody and control of the United States and ... to comply with all other fiduciary duties as determined by this Court"; (6) an order "providing for the restatement of the Nation's trust fund account balances in conformity with this accounting, as well as any additional equitable relief that may be appropriate (e.g., disgorgement, equitable restitution, or

an injunction directing the trustee to take action against third parties)"; and (7) an order "requiring the defendants to provide to the Nation all material information regarding the management and administration of the trust assets." *Id.* 91a-93a.

In the CFC complaint, by contrast, the Nation seeks money damages for the Government's failure to manage its assets prudently to obtain the maximum possible return. Count I alleges that the Government "breached its fiduciary duty by failing to lease [mineral rights] for fair market value." It seeks "a money damage award ... arising from [the Government's] mismanagement of the Nation's mineral resources." *Id.* 68a-69a. Count II alleges that the Government "breached its fiduciary duty by failing to lease [non-mineral property interests] and grant easements and rights of way for fair market value." It seeks "a money damage award ... arising from [the Government's] mismanagement of the non-mineral interests in the Nation's trust land." *Id.* 69a-70a. Count III alleges that, "[i]n breach of its fiduciary duty," the Government "has failed to invest ... judgment funds held in trust in a timely manner" and so as "to obtain the maximum investment returns possible," and that "[t]hese breaches of fiduciary duty" have "cause[d] damage to the Nation." *Id.* 70a-71a. Count IV alleges that the Government "breached its fiduciary duty ... by holding ... cash, in excess of liquidity needs" and "by failing to maximize trust income by prudent investment." It seeks damages due to "the [Government's] breach of fiduciary duties in its management and investment of trust funds." *Id.* 71a-72a.[9]

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[9] The Government is incorrect in claiming (Br. 46) that the CFC complaint seeks damages relating to "the government's

The prayer for relief seeks (1) "a determination that the Defendant is liable to the Nation in damages for the injuries and losses caused as a result of Defendant's breaches of fiduciary duty"; and (2) "a determination of the amount of damages due to the Nation plus interest." *Id.* 72a-73a.

The Nation's two complaints thus seek different relief. In the district court, the Nation seeks an equitable pre-liability accounting, along with a restatement of its account balances if necessary, and any appropriate equitable relief incident to such an accounting and restatement. That is, the Nation seeks an order directing the Government to tell the Nation precisely what it owns, including the funds held in trust, the boundaries of its land, the extent of its mineral and other rights, and the nature and location of any encumbrances on, or leases or permits regarding, those assets. To the extent the accounting reveals any errors in the Government's books, the Nation seeks to have them corrected. If the accounting reveals that assets belonging to the Nation are missing from its trust account, the Nation seeks whatever equitable relief the court deems appropriate, such as equitable restitution of those assets. Finally, the Nation seeks an order delineating the Government's fiduciary obligations and ordering it to fulfill those obligations in the future. In short, the Nation seeks to know what assets it *already owns* and to have its accounts corrected if any of those assets are missing from the trust.

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trust-account record-keeping." While the complaint states that the Government has not provided an accounting, its four counts allege entitlement to damages based only on the four specific acts of mismanagement identified above.

By contrast, in the CFC the Nation seeks only "money damages" stemming from the Government's failure to act as a prudent manager to obtain the maximum return on the Nation's assets. Pet. App. 58a. That is, the Nation seeks compensation for the loss of income it *never earned*, due to the Government's failure to act as a prudent manager of the trust. Because the district court complaint does not seek *this* relief, it is not a suit "for or in respect to" the Nation's claim in the CFC. That should end the analysis.[10]

2. To resolve this case, it is not necessary for this Court to delineate the precise boundary dividing the district court's jurisdiction from the CFC's. It is sufficient to recognize that the Nation seeks different relief in its two suits.

It is worth noting, however, that the Nation brought its claims in separate suits because, like the plaintiffs in *Casman* and *Loveladies*, it could not obtain complete relief in a single suit. The district court lacks

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[10] If this Court were to hold that §1500 applies whenever two suits arise out of the same operative facts, whether or not they seek different relief, the Court should remand to permit the Court of Appeals to apply that rule. The Nation argued below that its suits rest on different operative facts: To prove its claim for an accounting, the Nation would have to show that it had a trust relationship with the Government creating a duty to provide an accounting and the Government had failed to provide one; to prove its claim for damages, the Nation would have to show that the Government had breached a trust duty to act as a reasonably prudent manager of the Nation's assets, causing the Nation losses. The Court of Appeals expressly declined to decide whether the suits were based on the same "operative facts." Pet. App. 9a n.1. Should it prove necessary to reach that issue, this Court should remand to permit the Court of Appeals to decide it in the first instance. *See Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005).

jurisdiction to award the compensatory money damages the Nation seeks in the CFC. 5 U.S.C. §702. Likewise, the Court of Claims and its successors have long held that they lack jurisdiction over the Nation's district court claim for a pre-liability accounting. *Klamath & Modoc Tribes*, 174 Ct. Cl. at 487-491 (Government could not be compelled "to render a general accounting ... before its liability is determined" because court's jurisdiction "does not include actions in equity"); *Osage Nation* v. *United States*, 57 Fed. Cl. 392, 393 n.2 (2003) ("[T]his court does not have jurisdiction over claims for a pre-liability accounting."); *Cherokee Nation* v. *United States*, 21 Cl. Ct. 565, 582 (1990) (agreeing with Government that claim for accounting must be dismissed for lack of jurisdiction).

To obtain full relief, therefore, the Nation had no choice but to bring suit in the district court and the CFC—further confirmation that its suits are not the duplicative proceedings at which §1500 aims.[11]

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[11] Professor Sisk's argument (Sisk Br. 26-27) that the full pre-liability accounting the Nation seeks is properly obtained in the CFC, not the district court, has not been endorsed by the Government. Nor has the Federal Circuit repudiated the holding of *Klamath & Modoc* (notwithstanding the equivocal dicta in *Eastern Shawnee* on which Professor Sisk relies). Contrary to his suggestion, the Remand Act merely authorizes the CFC to "issue orders directing ... correction of applicable records" "collateral to [a] judgment" on a claim for damages. 28 U.S.C. §1491(a)(2). It does not expand the CFC's jurisdiction to include claims otherwise outside it. *United States* v. *Testan*, 424 U.S. 392, 404 (1976).

Even if Professor Sisk were correct, however, it would not follow that the Nation's CFC suit should be dismissed. While the Nation takes the position that the district court has jurisdiction to award all the relief the Nation seeks there, that question is not presented here, and Professor Sisk's arguments on the issue are

B. The Relief Sought In The Nation's Two Suits Does Not Overlap

There is no merit to the Government's contention (Br. 43-48) that the relief the Nation seeks in its two complaints overlaps and thus triggers §1500's jurisdictional bar.

1. It is well-settled that the pre-liability accounting the Nation seeks in district court is distinct from any post-liability "accounting in aid of judgment" that the CFC could direct to calculate money damages.

The accounting the Nation seeks in district court is a traditional trust remedy for obtaining information withheld by a trustee. Historically, a beneficiary could seek a full accounting in a court of equity without first having to demonstrate liability or a present entitlement to money. Bogert §142 ("It is not necessary to allege or prove that the trustee is in default or that the petitioner is presently entitled to any trust property."). Beneficiaries are entitled "to receive ... the full facts about the course of trust administration," including the "inspection of all books and documents relating to the trust." *Id.* §141. Such an accounting extends to nonmonetary aspects of the trust and ensures that a beneficiary has all the information necessary to protect his

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beside the point. The limitations on the district court's jurisdiction demonstrate that the Nation could not obtain in a single suit all the relief to which it is entitled and thus illuminate the anomalous consequences that flow from the Government's proposed rule. But that is the extent of their relevance. The question here is whether *the CFC* has jurisdiction over the Nation's suit in the CFC, not whether *the district court* has jurisdiction over the Nation's suit there. (For the same reason, the propriety of the district court's approach to its jurisdiction in *Cobell* v. *Babbitt*, 91 F. Supp. 2d 1 (D.D.C. 1999), is not before this Court.)

rights. *Restatement (Second) of Trusts* §173 cmt. c. (1959); Bogert & Bogert, *The Law of Trusts and Trustees* §861 (2d ed. 1995).

Such a full pre-liability accounting would inform the Nation of the precise metes and bounds of its land; the nature and location of its mineral rights and other rights in natural resources; rights-of-way or other easements burdening its land; the existence and terms of leases, permits, and other transactions the Government has entered into with regard to the Nation's land, mineral estate, and other assets; and the funds collected by the Government as a result of those transactions. It would also inform the Nation of the manner in which its trust funds are invested and the returns those funds are earning.

Because the Nation currently lacks much of this information, it is unable intelligently to exercise its rights with regard to its trust assets. With the benefit of a full accounting, the Nation might choose, for example, to withdraw assets from the Government's management, 25 U.S.C. §4022; to cancel an existing lease, 25 C.F.R. §162.619; or to ask a court of equity to protect future beneficiaries by enjoining a particular action. Thus, far from being "'merely a means to the end of satisfying a claim for the recovery of money'" (Sisk Br. 22), the accounting the Nation seeks in the district court is a means of obtaining *information* regarding the nature, history, and current status of its trust assets. It is an independent, non-monetary remedy that has significant value apart from any monetary relief the Nation might ultimately receive.

As discussed above, the CFC has held that it lacks jurisdiction to entertain a claim for such a pre-liability accounting. The only "accounting" the CFC may direct

is an "accounting in aid of judgment," which, as its name implies, is merely an aid to calculating damages *after* a plaintiff successfully establishes liability. Such an accounting is not properly considered "relief" at all. *Cf. Winthrop Iron Co.* v. *Meeker*, 109 U.S. 180, 183 (1883) (an "accounting ordered ... in aid of the execution of the decree" is "no part of the relief prayed for in the bill").

Moreover, any accounting in aid of judgment that the CFC might direct would have a far narrower scope than the pre-liability accounting sought in the district court. An accounting in aid of judgment, by definition, is ancillary to a claim for money damages, and is thus limited to calculating damages for specific, proven breaches of duty. *Pauley Petroleum Inc.* v. *United States*, 591 F.2d 1308, 1315 (Ct. Cl. 1979); *Klamath & Modoc*, 174 Ct. Cl. at 491 (plaintiff must prove its claim before being entitled to "an accounting in aid of ... render[ing] a money judgment on that claim"). Here, for instance, if the CFC found the Government liable only for breach of its fiduciary duty as to the Nation's mineral rights, any accounting in aid of judgment would be limited to calculating damages relating to mismanagement of mineral rights. Other vital information regarding the contents, management, and condition of the trust, necessary to protect the Nation's present rights and future interests, would be unavailable.

In short, an equitable accounting provides "*all* information regarding the trust and its execution which may be useful to the beneficiary in protecting his rights." Bogert §141 (emphasis added). An accounting in aid of judgment simply cannot—and does not purport to—include all such information.

2. Likewise, there is no overlap between any equitable monetary relief the district court might award incident to a historical accounting and the compensatory money damages the Nation seeks in the CFC. The district court complaint seeks only "appropriate" equitable relief, such as equitable restitution, ancillary to the accounting. That is, it seeks only restoration of assets to which the Nation already holds beneficial title, but which the accounting reveals are missing from the Nation's trust account. By contrast, in the CFC the Nation seeks only damages as compensation for money that it should have earned, but did not.

It is the substance of the relief requested, rather than its characterization as equitable or legal, specific or substitutionary, that governs the §1500 analysis. Because the relief the Nation requested in the two courts is substantively different, labels matter little.[12]

Nonetheless, "'the time-honored distinction between damages and specific relief,'" *Blue Fox*, 525 U.S. at 262, helps demonstrate why the monetary relief sought in the two complaints is indeed substantively different. "'Damages are given to the plaintiff to *substitute* for a suffered loss, whereas specific remedies are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.'" *Bowen* v. *Massachusetts*, 487 U.S. 879, 895 (1988); *see also Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 210-214 (2002); 1 Dobbs, *The Law of Remedies*

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[12] The Government's repeated complaints that the Court of Appeals' analysis hinged on the labels "legal" and "equitable" (*e.g.*, Br. 48) are thus ill-taken. The point, as the Court of Appeals made clear, is that regardless of label, the Nation sought *different*, non-duplicative relief in each court. Pet. App. 13a-14a.

§3.1 (2d ed. 1993) ("In its substitutionary character *damages* contrasts with *specific* relief, which 'prevents or undoes the loss—for example, by ordering return to the plaintiff of the precise property that has been wrongfully taken.'").

The Nation's district court complaint seeks a pre-liability accounting of its trust assets and, if necessary, a restatement of its accounts. It does not request monetary relief except to the extent such relief is "appropriate" to give effect to the accounting and restatement. Pet. App. 92a. Indeed, if the accounting reveals no errors in the Government's bookkeeping, the Nation would not be entitled to *any* monetary relief in the district court. If, on the other hand, the accounting reveals that assets that belong to the Nation do not appear on the books, it may be appropriate to order equitable restitution of those assets. *Great-West*, 534 U.S. at 213 (equitable restitution appropriate "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession"). Such equitable restitution does not seek "to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 214. In the district court, therefore, the Nation seeks nothing more than "'the very thing to which [it is] entitled,'" *Blue Fox*, 525 U.S. at 262—an accurate accounting of its assets and, if appropriate, restoration of assets it already owns.[13]

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[13] The Government argues (Br. 47) that because the district court complaint seeks an accounting of trust assets "including, but not limited to, funds under the custody and control of the United States" (Pet. App. 92a), the Nation is seeking "unrealized profits"

By contrast, the CFC suit seeks only money damages to compensate the Nation for the income it would have earned but for the Government's breach of its duty prudently to manage and invest the trust assets. *See Blue Fox*, 525 U.S. at 262 ("The term 'money damages' ... normally refers to a sum of money used as compensatory relief."). As a substitute for money the Nation should have earned but did not, the damages sought in the CFC are altogether different—in substance as well as in name—from any equitable monetary relief that might be available in district court.

3. In any event, even if there were some small degree of theoretical overlap between the relief sought in the two actions, that should not be dispositive when the gravamen of each complaint is separate and distinct. Courts can avoid duplicative litigation—and ensure that theoretical overlap does not materialize into actual double recovery—by staying one suit while the other proceeds and by application of ordinary principles of comity and preclusion.

In a series of statutes, Congress has broadly waived the United States' sovereign immunity from suit to allow its citizens to obtain redress for government wrongdoing. In doing so, Congress directed plaintiffs to litigate in different courts to obtain different remedies. Nothing in §1500 or the remainder of the jurisdictional scheme suggests that Congress thereby intended to create a trap for the unwary, barring plaintiffs whose pleadings are drafted with less than

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in the district court as well as the CFC. On the contrary, that language merely makes clear that the Nation is seeking an accounting of *all* its trust assets, including any assets in the hands of third parties.

mathematical precision from the only forum where they can obtain money damages. "'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome'"; rather, "'the purpose of pleading is to facilitate a proper decision on the merits.'" *United States* v. *Hougham*, 364 U.S. 310, 317 (1960). That should be as true in the CFC as in any other court.

This Court long ago rejected "the inadmissible premise that the great act of justice embodied in the jurisdiction of the court of claims is to be construed strictly and read with an adverse eye." *United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U.S. 28, 32 (1915) (Holmes, J.). It should not adopt such a reading for the first time here.

CONCLUSION

The Court of Appeals' judgment should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Counsel of Record
DANIELLE SPINELLI
CATHERINE M.A. CARROLL
ANNIE L. OWENS
SONYA L. LEBSACK
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000
seth.waxman@wilmerhale.com

KEITH M. HARPER
G. WILLIAM AUSTIN
CATHERINE F. MUNSON
KILPATRICK STOCKTON LLP
607 14th Street, N.W.
Washington, D.C. 20005
(202) 508-5800

ADAM H. CHARNES
KILPATRICK STOCKTON LLP
1001 West Fourth Street
Winston-Salem, NC 27101
(336) 607-7300

RAYMOND M. BENNETT
KILPATRICK STOCKTON LLP
3737 Glenwood Ave.
Raleigh, NC 27612
(919) 420-1700

AUGUST 2010

STATUTORY ADDENDUM

STATUTORY ADDENDUM

Act of Feb. 24, 1855, ch. 122, §1, 10 Stat. 612, 612

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a court shall be established to be called a Court of Claims, to consist of three judges, to be appointed by the President, by and with the advice and consent of the Senate, and to hold their offices during good behaviour; and the said court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to said court by either house of Congress. It shall be the duty of the claimant in all cases to set forth a full statement of the claim, and of the action thereon in Congress, or by any of the departments, if such action has been had; specifying also what person or persons are owners thereof or interested therein, and when and upon what consideration such person or persons became so interested. Each of the said judges shall receive a compensation of four thousand dollars per annum, payable quarterly, from the treasury of the United States, and shall take an oath to support the Constitution of the United States, and discharge faithfully the duties of his office.

Act of Mar. 3, 1863, ch. 92, §§1-3, 5, 12 Stat. 765, 765, 766

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be appointed by the President, by and with the advice and consent of the Senate,

two additional judges for the said court, to hold offices during good behavior, who shall be qualified in the same manner, discharge the same duties, and receive the same compensation, as now provided in reference to the judges of said court; and that from the whole number of said judges the President shall in like manner appoint a chief justices for said court.

SEC. 2. *And be it further enacted*, That all petitions and bills praying or providing for the satisfaction of private claims against the Government, founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, shall unless otherwise ordered by resolution of the house in which the same are presented or introduced, be transmitted by the secretary of the Senate or the clerk of the House of Representatives, with all the accompanying documents, or the court aforesaid.

SEC. 3. *And be it further enacted*, That the said court, in addition to the jurisdiction now conferred by law, shall also have jurisdiction of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the Government against any person making claim against the Government in said court; and upon the trial of any such cause it shall hear and determine such claim or demand both for and against the Government and claimant; and if upon the whole case it finds that the claimant is indebted to the Government, it shall *under* [render] judgment to that effect, and such judgment shall be final, with the right of appeal, as in other cases herein provided for. Any transcript of such judgment, filed in the clerk's office of any district or circuit court of the United States, shall be entered upon the records of the same, and shall ipso facto become and

be a judgment of such district or circuit court, and shall be enforced in like manner as other judgments therein.

* * *

SEC. 5. *And be it further enacted,* That either party may appeal to the supreme court of the United States from any final judgment or decree which may hereafter be rendered in any case by said court wherein the amount in controversy exceeds three thousand dollars, under such regulations as the said supreme court may direct: *Provided,* That such appeal shall be taken within ninety days after the rendition of such judgment or decree: *And provided, further,* That when the judgment or decree will affect a class of cases, or furnish a precedent for the future action of any executive department of the Government in the adjustment of such class of cases, or a constitutional question, and such facts shall be certified to by the presiding justice of the court of claims, the supreme court shall entertain an appeal on behalf of the United States, without regard to the amount in controversy.

Act of Mar. 3, 1863, ch. 120, §§1-3, 12 Stat. 820, 820

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall be lawful for the Secretary of the Treasury, from and after the passage of this act, as he shall from time to time see fit, to appoint a special agent or agents to receive and collect all abandoned or captured property in any state or territory, or any portion of any state or territory, of the United States, designated as in insurrection against the lawful Government of the United States by the proclamation of the President of July first, eighteen hundred and sixty-two: *Provided,* That such property shall not include any kind

or description which has been used, or which was intended to be used, for waging or carrying on war against the United States, such as arms, ordnance, ships, steamboats, or other water craft, and the furniture, forage, military supplies, or munitions of war.

SEC. 2. *And be it further enacted*, That any part of the goods or property received or collected by such agent or agents may be appropriated to public use on due appraisement and certificate thereof, or forwarded to any place of sale within the loyal states, as the public interests may require; and all sales of such property shall be at auction to the highest bidder, and the proceeds thereof shall be paid into the treasury of the United States.

SEC. 3. *And be it further enacted*, That the Secretary of the Treasury may require the special agents appointed under this act to give a bond, with such securities and in such amount as he shall deem necessary, and to require the increase of said amounts, and the strengthening of said security, as circumstances may demand; and he shall also cause a book or books of account to be kept, showing from whom such property was received, the cost of transportation, and proceeds of the sale thereof. And any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the court of claims; and on proof to the satisfaction of said court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of such proceeds, after the deduction of any purchase-money which may have been paid, together with the expense of transportation and

sale of said property, and any other lawful expenses attending the disposition thereof.

Act of June 25, 1868, ch. 71, §8, 15 Stat. 75, 77

SEC. 8. *And be it further enacted*, That no person shall file or prosecute any claim or suit in the court of claims, or an appeal therefrom, for or in respect to which he or any assignee of his shall have commenced and has pending any suit or process in any other court against any officer or person who, at the time of the cause of action alleged in such suit or process arose, was in respect thereto acting or professing to act, mediately or immediately, under the authority of the United States, unless such suit or process, if now pending in such other court, shall be withdrawn or dismissed within thirty days after the passage of this act.

1 Rev. Stat. 197, §1067 (2d ed. 1878)

SEC. 1067. No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States.

Act of Mar. 3, 1887, ch. 359, §§1-2, 24 Stat. 505, 505

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however*, That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, Department, or commission authorized to hear and determine the same.

Second. All set-offs, counter claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided*, That no suit against the Government of the United States, shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made.

SEC. 2. That the district courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dol-

lars. All causes brought and tried under the provisions of this act shall be tried by the court without a jury.

Act of Mar. 3, 1911, ch. 231, §154, 36 Stat. 1087, 1138

SEC. 154. No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any [claim] for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was in respect thereto, acting or professing to act, mediately or immediately under the authority of the United States.

Act of Aug. 13, 1946, ch. 959, §24, 60 Stat. 1049, 1055-1056

SEC. 24. The jurisdiction of the Court of Claims is hereby extended to any claim against the United States accruing after the date of the approval of this Act in favor of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws, treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band, or group. In any suit brought under the jurisdiction conferred by this section the claimant shall be entitled to recover in the same manner, to the same extent, and subject to the same conditions and limitations, and the United States shall be entitled to the same defenses, both at law and in equity, and to the same offsets, counterclaims, and demands, as in cases brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U.S.C., sec.

250, as amended: *Provided, however*, That nothing contained in this section shall be construed as altering the fiduciary or other relations between the United States and the several Indian tribes, bands, or groups.

Act of June 25, 1948, ch. 646, §1500, 62 Stat. 869, 942

§ 1500. Pendency of claims in other courts

The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

28 U.S.C. §1500 (2006). Pendency of claims in other courts

The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

REPLY BRIEF

Supreme Court, U.S.
FILED
SEP 27 2010
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No. 09-846

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

TOHONO O'ODHAM NATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

255 31

TABLE OF CONTENTS

Page

I. Section 1500 precludes CFC jurisdiction when the plaintiff has a suit pending in another court based on substantially the same operative facts 3
   A. Historical context refutes the Tribe's construction of Section 1500 3
   B. The Tribe's proffered reading improperly restricts Section 1500's expansive text 9
   C. The Tribe's policy arguments must be directed to Congress 16
   D. This Court should reject the Federal Circuit's flawed order-of-filing rule 19
II. The Tribe's suits seek overlapping relief 20
Appendix – Statutory provisions 1a

TABLE OF AUTHORITIES

Cases:

Alexander v. *Sandoval*, 532 U.S. 275 (2001) 16
Beers v. *Arkansas*, 61 U.S. (20 How.) 527 (1858) 14
Block v. *North Dakota*, 461 U.S. 273 (1983) 14
Brown v. *United States*, 358 F.2d 1002 (Ct. Cl. 1966) 16
Camp v. *United States*, 113 U.S. 648 (1885) 6
Casman v. *United States*, 135 Ct. Cl. 647 (1956) 15
Corley v. *United States*, 129 S. Ct. 1558 (2009) 11
Dennistoun v. *Draper*, 7 F. Cas. 488 (C.C.S.D.N.Y. 1866) 6
Elgee's Adm'r v. *Lovell*, 8 F. Cas. 449 (C.C.D. Mo. Oct. Term 1865), aff'd by an equally divided Court, No. 63 (Jan. 27, 1868) 5, 6
Fuentes v. *Shevin*, 407 U.S. 67 (1971) 4

Cases—Continued: Page

Hepburn & Dundas' Heirs v. *Dunlop & Co.*, 14 U.S. (1 Wheat.) 179 (1816) 4
Honda v. *Clark*, 386 U.S. 484, 501 (1967) 13
Hossein v. *United States*, 218 Ct. Cl. 727 (1978) 16
INS v. *St. Cyr*, 533 U.S. 289 (2001) 13
John R. Sand & Gravel Co. v. *United States*, 552 U.S. 130 (2008) 14
Keene Corp. v. *United States*, 508 U.S. 200 (1993) ..... *passim*
Lamar v. *McCulloch*, 115 U.S. 163 (1885) 8
Lehman v. *Nakshian*, 453 U.S. 156 (1981) 13, 14
Lingle v. *Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) 17
Matson Navigation Co. v. *United States*, 284 U.S. 352 (1932) 12
McElrath v. *United States*, 102 U.S. 426 (1880) 13
McLeod v. *Callicott*, 16 F. Cas. 295 (C.C.D.S.C. June Term 1869) 4
Minick v. *City of Troy*, 83 N.Y. 514 (1881) 10
Norton v. *Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) 17
Olcott v. *Wood*, 14 N.Y. 32 (N.Y. 1856) 10
Prigg v. *Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842) ... 9, 10
Richlin Sec. Serv. Co. v. *Chertoff*, 553 U.S. 571 (2008) ... 15
Shepard v. *United States*, 544 U.S. 13 (2005) 15
Soriano v. *United States*, 352 U.S. 270 (1957) 13
Stowel v. *Zouch*, 75 Eng. Rep. 536, 1 Plowd. 353 (Ct. of Exch. Chamb. 1569) 9

Cases—Continued: Page

Tecon Eng'rs, Inc. v. *United States*, 343 F.2d 943 (Ct. Cl. 1965), cert. denied, 382 U.S. 976 (1966) 19
The Elgee Cotton Cases, 89 U.S. (22 Wall.) 180 (1885) 6
Tweed's Case, 83 U.S. (16 Wall.) 504 (1873) 4
United States v. *Dalm*, 494 U.S. 596 (1990) 13
United States v. *Navajo Nation*, 129 S. Ct. 1547 (2009) 18
United States v. *Nordic Vill. Inc.*, 503 U.S. 30 (1992) 14
United States v. *Sherwood*, 312 U.S. 584 (1941) 13, 14
West v. *Gibson*, 527 U.S. 212 (1999) 13

Constitution, statutes and rules:

U.S. Const.:
Art. I, § 9, Cl. 7 (Appropriations Clause) 5
Amend. V 17
Just Compensation Clause 17
Abandoned Property Collection Act, ch. 120, 12 Stat. 820 3
§ 1, 12 Stat. 820 3
§ 3, 12 Stat. 820 3
Act of Mar. 30, 1868, J. Res. 25, 15 Stat. 251:
§ 1, 15 Stat. 251 5
§ 3, 15 Stat. 251 5
Act of July 27, 1868, ch. 276, § 3, 15 Stat. 243 8
Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 16
Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* 14
Indian Tucker Act, 28 U.S.C. 1505 12
28 U.S.C. 260 (1946) 20

Statutes and rules—Continued: Page

28 U.S.C. 1500 ..... *passim*
Fed. Cl. R. 54(c) 9
Fed. R. Civ. P. 54(c) 9

Miscellaneous:

Cong. Globe, 40th Cong., 1st Sess 322 (1867) 7
Cong. Globe, 40th Cong., 2d Sess. (1867):
p. 120 5
p. 122 7
p. 378 5
p. 380 5
p. 383 7
Cong. Globe, 40th Cong., 2d Sess. (1868):
p. 1466 7
pp. 1466-1468 5
pp. 1466-1470 5
pp. 1467-1470 5
p. 1468 5
pp. 1489-1497 5
pp. 1490-1491 5
p. 1491 7
p. 1812-1813 5
p. 2171 5
p. 2176 5
p. 2750 7
p. 2769 ..... 8, 12
p. 3255 8
p. 3267 8

Miscellaneous—Continued: Page

p. 3620 8
p. 3655 8
p. 4449 8
Dan D. Dobbs, *Law of Remedies* (1973) 4, 6
H.R. 1131, 40th Cong., 2d Sess. (1868) 7, 8
S. Exec. Doc. 22, 40th Cong., 2d Sess. (1868) 6, 7
S. Exec. Doc. 56, 40th Cong., 2d Sess. (1868) 7

In the Supreme Court of the United States

No. 09-846

UNITED STATES OF AMERICA, PETITIONER

v.

TOHONO O'ODHAM NATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

In *Keene Corp.* v. *United States*, 508 U.S. 200 (1993), this Court held that 28 U.S.C. 1500 deprives the Court of Federal Claims (CFC) of jurisdiction over a claim against the government if the plaintiff has another suit pending in another court against the United States or an agent thereof "based on substantially the same operative facts as the [CFC] action, at least if there was some overlap in the relief requested." 508 U.S. at 212. *Keene* did not resolve whether the CFC lacks jurisdiction in all cases where the other suit is based on "substantially the same operative facts." *Id.* at 212 & n.6.

The Federal Circuit in this case accepted that the Tribe's simultaneous suits against the United States in the CFC and in district court are based on the "same operative facts." Pet. App. 8a-9a & n.1. The court nevertheless held Section 1500 inapplicable because, in its

view, the Tribe's two cases sought different relief: legal monetary relief in the CFC and equitable monetary relief (including disgorgement and equitable restitution, *id.* at 11a-13a) in district court. The Federal Circuit declared that its distinction between legal and equitable relief was "critical to the § 1500 analysis." *Id.* at 12a.

The government's opening brief demonstrates that Section 1500 applies whenever a plaintiff's other suit or process arises from substantially the same operative facts as its claim in the CFC (U.S. Br. 19-31); that the Federal Circuit's contrary view cannot be sustained (*id.* at 31-42); and that its legal-equitable rationale is deeply flawed (*id.* at 43-45). The Tribe now abandons the Federal Circuit's reasoning, and instead argues (at 50) that "[i]t is the substance of the relief requested, rather than its characterization as equitable or legal, * * * that governs the §1500 analysis."

In the Tribe's view, Section 1500 applies only when the plaintiffs' "two suits seek the same substantive relief" (Resp. Br. 14, 22, 24) because Section 1500 uses the term "claim" to mean a demand for "particular relief" or a "particular kind of relief" (*id.* at 14, 18-19, 22, 28). The Tribe thus appears to distinguish between demands for "a specific thing, act, [and] sum of money" (*id.* at 18), and suggests that Section 1500 applies only where two parallel suits seek the same category of relief. *Id.* at 50-52. That reading, the Tribe asserts, follows from Section 1500's origins as a response to duplicative lawsuits brought by persons claiming ownership of cotton seized during the Civil War because those suits "sought the same relief—monetary compensation for the same lost cotton." *Id.* at 25-26.

The Tribe's arguments do not withstand scrutiny. Congress knew that cotton claimants brought a variety

of actions, some for money and others for specific relief. Moreover, the term "claim" does not embody a request for a *particular* kind of relief and, in any event, Section 1500 is triggered whenever the plaintiff's other "suit or process" is one "for *or* in respect to" its "claim" in the CFC. Finally, the Tribe's interpretation would improperly expand Congress's waiver of sovereign immunity beyond the text of Section 1500 and invite strategic manipulation of the pleading process.

I. SECTION 1500 PRECLUDES CFC JURISDICTION WHEN THE PLAINTIFF HAS A SUIT PENDING IN ANOTHER COURT BASED ON SUBSTANTIALLY THE SAME OPERATIVE FACTS

A. Historical Context Refutes The Tribe's Construction Of Section 1500

The Tribe's argument hinges on a misreading of the historical record. The Abandoned Property Collection Act (APCA), ch. 120, 12 Stat. 820, enacted on March 12, 1863, authorized Treasury agents to seize certain property in insurrectionist States and authorized persons claiming ownership to sue in the Court of Claims to recover monetary compensation. §§ 1, 3.[1] Many claimants, however, recognized the difficulty of satisfying the statutory requirement that they prove their loyalty to the Union, and they therefore "resorted to separate suits in other courts" against government officials. *Keene*, 508 U.S. at 206. The Tribe asserts (at 1, 4, 14, 25-27) that those "tort suits"—the very suits that prompted Congress to enact Section 1500's predecessor—"sought the same relief for the same injury as their

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[1] Many authorities refer to APCA as the Captured and Abandoned Property Act.

counterpart suits in the Court of Claims: money for the same confiscated cotton." That assertion is wrong.

Cotton claimants brought a variety of suits against federal officers. As *Keene* recognized, some brought actions on "tort theories such as conversion" that provided monetary relief for seized cotton. See 508 U.S. at 206; see, *e.g.*, *McLeod* v. *Callicott*, 16 F. Cas. 295 (C.C.D.S.C. June Term 1869) (No. 8897). But others sued federal officers for specific relief, *i.e.*, the return of their cotton. See, *e.g.*, *Tweed's Case*, 83 U.S. (16 Wall.) 504 (1873).[2] Their suits for writs of "replevin" and "detinue" (and Louisiana's civil-law analog, "sequestration") necessarily sought "recovery of the property itself," *i.e.*, the "property in specie." See Dan D. Dobbs, *Law of Remedies* § 5.13, at 399 (1973) (*Dobbs*); see also *Fuentes* v. *Shevin*, 407 U.S. 67, 78-79 (1972); *Hepburn & Dundas' Heirs* v. *Dunlop & Co.*, 14 U.S. (1 Wheat.) 179, 203 n.d (1816) ("the thing sued for is specifically recovered" in "actions of detinue and replevin," unlike in other actions providing "compensation in money").

As explained below, Congress was familiar with such cotton suits for specific relief. And by enacting Section 1500's predecessor, it sought to bar jurisdiction in the Court of Claims (now the CFC) when a plaintiff had "any" such related "suit or process" in another court—*i.e.*, a suit involving "substantially the same operative facts," *Keene*, 508 U.S. at 212—regardless whether it sought monetary or specific relief. 28 U.S.C. 1500.

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[2] Tweed sued a Treasury agent in 1866 "to recover * * * the cotton"; secured an interim "writ of sequestration" to have the marshal "take the cotton in question into his possession"; then recovered the cotton while the writ was adjudicated by "bond[ing] the property"; and ultimately showed he was entitled to keep it. 83 U.S. at 509, 513-515; *id.* at 521 (Bradley, J., dissenting).

1. Congress closely monitored litigation regarding seized cotton and its effect on the Nation's post-Civil-War fisc. In March 1868, Congress enacted legislation drafted by the same Senator—Senator Edmunds—who less than three months later authored Section 1500's predecessor. The March 1868 Act required the Secretary of the Treasury and his agents to deposit funds from sales of captured and abandoned property under APCA "immediately" into the Treasury. Act of Mar. 30, 1868, J. Res. 25, § 1, 15 Stat. 251; see Cong. Globe, 40th Cong., 2d Sess. 120 (1867) (Sen. Edmunds). Prompt deposit ensured that "the rights of the Government [would be] properly protected" against any claims to such funds. *Id.* at 378 (1868) (Sen. Trumbull); see *id.* at 380 (Sen. Howe) (Appropriations Clause protections).

Significantly, the statute also appropriated funds to defend suits for "captured and abandoned property" brought "against [the Secretary] or his agents." § 3, 15 Stat. 251; see Cong. Globe, 40th Cong., 2d Sess. 1466-1470, 1489-1497 (1868) (*1868 Cong. Globe*); *id.* at 1812-1813, 2171, 2176. The Senate Finance Committee had studied the cotton issue "for months" and, as Senator Edmunds explained, roughly "one hundred lawsuits" were then pending against the Secretary and his agents "in different parts of the country," with plaintiffs variously seeking specific and monetary relief—*i.e.*, "th[e] very cotton and * * * the proceeds of it." *Id.* at 1466-1468; see also, *e.g.*, *id.* at 1467-1470, 1490-1491 (repeated references to roughly one "hundred" suits). Senator Edmunds announced that one of the cases—"the case that came up from Missouri"—had equally divided this Court. *Id.* at 1468; see *Elgee's Adm'r* v. *Lovell*, 8 F. Cas. 449 (C.C.D. Mo. Oct. Term 1865) (No. 4344) (*Elgee*),

aff'd by an equally divided Court, No. 63 (Jan. 27, 1868). Notably, that case sought specific relief, not damages.[3]

During the debate, Members of Congress paid particular attention to the suit that the Tribe itself cites (at 4) as illustrative of the cotton cases: *Dennistoun* v. *Draper*, 7 F. Cas. 488 (C.C.S.D.N.Y. 1866) (No. 3804). That case too involved specific, not monetary, relief. The *Dennistoun* plaintiffs brought their "replevin suit in * * * state court" to recover their cotton, which was "in [the] possession" of a Treasury agent (Draper) who removed the action to federal circuit court. *Id.* at 489. That court held that the plaintiffs' challenge to removal must be decided in federal court. *Id.* at 489-490. It suggested that the parties agree to "the disposition of the cotton in the meantime," and that it might be appropriate to sell the cotton and deposit "the proceeds * * * into the [court] registry" as a substitute while the case was resolved. *Id.* at 490.

Rather than lose control of the cotton, the Secretary deposited a substantial sum ($500,000) with a trust company to enable Draper to secure a replevin bond and regain possession of the cotton while the case was litigated. See S. Exec. Doc. 22, 40th Cong., 2d Sess. 2 (1868) (Secretary's Jan. 16, 1868, letter to Senate); *id.* at 5 (Secretary's Mar. 2, 1867, letter to Senate); cf. *Dobbs*

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[3] The *Elgee* plaintiff filed a state-court detinue action against a Treasury agent (Lovell) to "recover the possession of 275 bales of cotton." 8 F. Cas. at 449, 451-453. The suit was later removed to federal court, the cotton was sold and its proceeds used as a substitute *res* pending judgment, which later was entered for the agent. See *id.* at 454; *Camp* v. *United States*, 113 U.S. 648, 650 (1885) (discussing *Elgee* as "an action of replevin"). After this Court equally divided, Elgee's representatives instituted a new suit in the Court of Claims and ultimately recovered the net sale proceeds under APCA. See *id.* at 651; *The Elgee Cotton Cases*, 89 U.S. (22 Wall.) 180, 185-186, 198 (1875).

§ 5.13, at 400-401 (explaining replevin bonds). The Senate passed multiple resolutions directing the Secretary to report on cotton claims and, while debating the May 1868 statute, repeatedly discussed the propriety of the "replevin"-bond decision in *Dennistoun*. See, *e.g.*, Cong. Globe, 40th Cong., 1st Sess. 322 (1867); *1868 Cong. Globe* 122, 383, 1466. Senator Edmunds, the statute's author, specifically explained that the suit was "an action of replevin for the cotton" and that the government therefore must "either let the cotton go without any right to it at all" or "furnish to Mr. Draper, it being a very large sum, the means of getting sureties to hold on to it himself and keep it for the Government." *Id.* at 383.[4]

2. Shortly after appropriating funds in the March 1868 statute to defend such suits against Treasury officials, Congress turned to two bills curtailing cotton suits: H.R. 1131 and the predecessor to Section 1500. On June 1, 1868, Representative Butler introduced H.R. 1131. *1868 Cong. Globe* 2750. That bill declared that a Court of Claims action under APCA was the "exclusive" remedy for claimants if their property had been obtained "in virtue or under color of" APCA, and it specified that claimants were therefore "preclud[ed] * * * from suit at common law, or any mode of redress whatever, before any court or tribunal other than [the] Court

[4] The cotton, bond, and associated deposit appear to have been released upon the government's lump-sum payment to settle *Dennistoun*. See S. Exec. Doc. 22, at 2; *1868 Cong. Globe* 1466 (Sen. Stewart). Congress was advised, however, that Draper—who had handled over half of the Treasury's seized-cotton sales by 1868—had been sued by many others in "suits of trespass," which (unlike replevin and detinue) sought damages at "the full value of the cotton" at the "market price at the time of seizure," an amount that exceeded "the gross proceeds" from its actual sale. *Id.* at 1491 (Sen. Edmunds); see S. Exec. Doc. 56, 40th Cong., 2d Sess. 2-3, 52 (1868).

of Claims," including "suits of trespass, *replevin*, *detinue*, or other forms of action" that "are now pending" or may "hereafter be brought." *Id.* at 3620 (text as introduced) (emphasis added); cf. *id.* at 3655, 4449 (amendments). Congress enacted H.R. 1131 with that express focus on pending replevin and detinue actions, illustrating its understanding that cotton cases like *Dennistoun* sought specific relief against government officials. See Act of July 27, 1868, § 3, 15 Stat. 243.

Just one day after H.R. 1131 was introduced, Senator Edmunds introduced and the Senate passed the amendment that became Section 1500. *1868 Cong. Globe* 2769, 3267, 3255; U.S. Br. 3-4. Senator Edmunds invoked the very same cotton cases that Congress previously debated, by again explaining that over a "hundred suits [were] pending" against the "Secretary of the Treasury and other agents" by "persons having cotton claims." *1868 Cong. Globe* at 2769. He announced that his proposal would put such plaintiffs "to their election" and force them "either to leave the Court of Claims or to leave the other courts." *Ibid.*[5]

In this context, Congress undoubtedly understood and intended that Section 1500's predecessor would be triggered by a related suit seeking *specific* relief different from the *monetary* relief available in the Court of Claims. The Tribe's reading of Section 1500, which would give dispositive effect to whether the non-CFC

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[5] Congress enacted H.R. 1131 one month after it enacted Section 1500's predecessor. The July 1868 Act thereafter significantly curtailed the option of a tort action for cotton seized under APCA, see *Lamar* v. *McCulloch*, 115 U.S. 163, 182-187 (1885) (suit is precluded if the Treasury agent in "good faith" but mistakenly seized cotton under APCA), but it did not affect Section 1500's more general bar on pursuing duplicative suits in the CFC and elsewhere.

suit seeks specific rather than monetary relief, cannot be squared with that history.

B. The Tribe's Proffered Reading Improperly Restricts Section 1500's Expansive Text

1. Ignoring this history, the Tribe contends that whether a "suit or process" is "for or in respect to" a CFC "claim" under Section 1500 turns on whether the suit or process seeks the "same substantive relief" as the CFC claim. The Tribe argues that the "same substantive relief" is required because the term "claim" means a "demand for *particular* relief," that is, a "demand for a particular *kind* of relief" such as "a specific thing, act, or sum of money." Resp. Br. 14, 18-19, 22 (emphasis added). That contention cannot be squared with *Keene* or Section 1500's text or origins.

First, the Tribe's reliance on dictionary definitions of "claim" is misplaced. The dictionaries it cites (at 18)—which cite and borrow their definitions from *Prigg* v. *Pennsylvania*, 41 U.S. (16 Pet.) 539, 615 (1842) (Story, J.), and *Prigg*'s quotation from *Stowel* v. *Zouch*, 75 Eng. Rep. 536, 544, 1 Plowd. 353, 359 (Ct. of Exch. Chamb. 1569)—do not sustain the Tribe's narrow reading. *Prigg* simply states that a claim is a "demand of some matter as of right made by one person upon another, to do or to forbear to do some act or thing as a matter of duty." 41 U.S. at 615. While a "claim" involves some demand, nothing suggests that the term must embody a "particular kind" of relief. Indeed, a claim in a complaint need not request the particular relief the court will award, because the relief awarded is that to which the party ultimately shows it is entitled. U.S. Br. 42 (discussing Fed. R. Civ. P. 54(c) and Fed. Cl. R. 54(c)). Even the "more limited" definition from *Stowel*—a "challenge by

a man of the propriety or ownership of a thing * * * which is wrongfully detained from him," *Prigg*, 41 U.S. at 615 (citation omitted)—does not suggest a demand for a particular kind of relief. It simply involves an assertion of some legal wrong. The term "claim" thus reflects an assertion of right that "is made out when the facts constituting it are established." *Minick* v. *City of Troy*, 83 N.Y. 514, 516 (1881). It embodies "the subject of the controversy and not the relief which the claimant asks." *Olcott* v. *Wood*, 14 N.Y. 32, 40 (1856). Section 1500's application therefore turns on an examination of a claim's "operative facts," *Keene*, 508 U.S. at 212.

Second, Congress's use of the term "any" to modify both "suit or process" and "claim" underscores Section 1500's breadth. U.S. Br. 22. When combined with Congress's use of the sweeping, disjunctive phrase "for *or* in respect to," the text demonstrates that Section 1500 is to be given a broad, not narrow, preclusive scope. *Id.* at 4-5, 21-22. By removing CFC jurisdiction when a plaintiff pursues any non-CFC suit either "for" any CFC claim or "in respect to" such a claim, Congress rejected "narrow concept[s] of identity" between the other suit and CFC claim (*Keene*, 508 U.S. at 213), such as the Tribe's assertion that both must involve the same "particular type of relief."

The Tribe argues (at 24) that "'[i]n respect to' frequently signifies something narrower than associated * * * in any way" and can mean "as to that specific [thing]." The Tribe's reading, however, does not account for Congress's use of the disjunctive "or" in the phrase "for or in respect to." Section 1500's application when the plaintiff has another suit "for" the CFC claim itself bars a CFC action "as to that specific" claim.

In an effort to give "in respect to" meaning, the Tribe suggests (at 24) that the phrase extends Section 1500 beyond simply "identical claims" to "claims seeking the same substantive relief, but pled on different legal theories or against different federal defendants." That reading, however, disregards this Court's authoritative construction of "claim" in *Keene* and other aspects of the plain text. *Keene* establishes that the term "claim" in Section 1500 itself includes "no reference to the legal theory upon which a claimant seeks to enforce his demand." 508 U.S. at 212 (citation omitted). Thus, under *Keene*, a "claim" encompassing different legal theories in two suits already constitutes the same "claim." Section 1500's remaining text similarly shows that the statute applies when the plaintiff has "any suit or process against the United States or any [agent thereof]" "for" the CFC claim. Given that language, the phrase "or in respect to" is not needed to capture cases in which the plaintiff sues the United States in the CFC and a federal agent in another court. The Tribe's construction therefore fails to give "in respect to" any independent role in Section 1500 and is "at odds with one of the most basic interpretive canons, that 'a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley* v. *United States*, 129 S. Ct. 1558, 1566 (2009) (citation and brackets omitted).

The Tribe complains (at 23-24) that the government's reading of "in respect to" has no limiting principle and renders Section 1500 uncertain. That is incorrect. *Keene* held that Section 1500 turns on "whether the plaintiff's other suit [i]s based on substantially the same operative facts," reserving the question whether at least "some overlap" in relief was necessary. 508 U.S. at 212

& n.6. Overlapping relief is irrelevant. The relevant test is "substantially the same operative facts."

Finally, Section 1500's origins, explained above, confirm that reading. Congress understood that cotton claimants seeking to evade the obstacles imposed by APCA in a Court of Claims action had brought tort actions that alternatively sought specific and monetary relief. See pp. 3-9, *supra*. Section 1500's evident purpose was to target all such "duplicative lawsuits." *Keene*, 508 U.S. at 206; U.S. Br. 23.[6]

2. Sovereign immunity principles further confirm that conclusion and require that any remaining ambiguity in Section 1500's limitation on Congress's consent to suit be construed to preserve immunity. U.S. Br. 24-28. The Tribe does not contend that Section 1500's text unambiguously supports its reading, nor does it dispute that the provision, strictly construed, would require reversal. It instead argues (at 36) that the "clear-statement rule" is inapplicable because that rule simply ensures that "Congress does not unknowingly subject the Government to suit" and, here, the Indian Tucker Act, 28 U.S.C. 1505, waives immunity from money damages. That reasoning is mistaken.

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[6] The Tribe suggests (at 25) that Section 1500's declared purpose was to address circumstances where *res judicata* did not preclude multiple suits with non-mutual defendants (the United States and its agents). The debates in Congress, however, never mentioned that doctrine, *1868 Cong. Globe* 2769, and it is unlikely that Section 1500's predecessors ever "perform[ed] th[at] preclusion function," *Keene*, 508 U.S. at 214 n.8, 217. Moreover, in 1948, Congress *expanded* Section 1500 to preclude simultaneous suits against the United States, *id.* at 211 n.5 (noting that legislation superceded *Matson Navigation Co.* v. *United States*, 284 U.S. 352 (1932)), demonstrating that Section 1500 cannot be restricted by such res-judicata concepts.

It is settled that Congress may "declare in what court [the sovereign] may be sued, and prescribe the forms of pleading and the rules of practice to be observed" when it waives immunity from suit. *McElrath* v. *United States*, 102 U.S. 426, 440 (1880). Congress's power to waive immunity necessarily carries with it the power "to attach conditions to its consent," and the "terms of its consent * * * define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood*, 312 U.S. 584, 586-587 (1941). Both the general waiver and the associated conditions are equally important elements that define the scope of Congress's consent to suit, and both must be strictly construed in favor of immunity to preserve Congress's primacy in this area. See U.S. Br. 25-26; *United States* v. *Dalm*, 494 U.S. 596, 610 (1990); see also *INS* v. *St. Cyr*, 533 U.S. 289, 299 n.10 (2001); *West* v. *Gibson*, 527 U.S. 212, 224 (1999) (Kennedy, J., dissenting) (sovereign-immunity canons "reserve authority over the public fisc to the branch of Government with which the Constitution has placed it"). Thus, "[l]ike a waiver of immunity itself, * * * th[e] limitations and conditions upon which the Government consents to be sued must be strictly observed." *Lehman* v. *Nakshian*, 453 U.S. 156, 160-161 (1981) (quoting *Soriano* v. *United States*, 352 U.S. 270, 276 (1957)).

The Tribe errs in asserting (at 36 n.8) that the strict-construction canon applies only when deciding whether immunity has been waived for a "particular cause of action or remedy." This Court "in many cases * * * has read procedural rules embodied in statutes waiving immunity strictly, with an eye to effectuating a restrictive legislative purpose when Congress relinquishes sovereign immunity." *Honda* v. *Clark*, 386 U.S. 484, 501 (1967). It has, for instance, applied the strict-

construction canon to require an "unambiguous[]" statutory grant to authorize a jury trial against the sovereign, *Nakshian*, 453 U.S. at 168; to interpret statutes of limitation, *Block* v. *North Dakota*, 461 U.S. 273, 287-289 (1983); and to apply certain "Rules of Civil Procedure" that would normally permit a judgment creditor to collect on its debtor's contract with a third-party, *Sherwood*, 312 U.S. at 588-590. See also, *e.g.*, *Beers* v. *Arkansas*, 61 U.S. (20 How.) 527, 529 (1858) (requirement that a plaintiff must surrender the bond on which he sues is a "term[] and condition[] on which [the sovereign] consents to be sued" within the "waive[r]" of immunity).

The Tribe relies (at 36-38) on four cases construing exceptions to Congress's waiver of immunity in the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* Those decisions reflect only that the Court has "on occasion" deemed it "consistent with Congress' clear intent" not to read such exceptions unduly broadly in the "context of the 'sweeping language' of the Federal Tort Claims Act." *United States* v. *Nordic Vill. Inc.*, 503 U.S. 30, 34 (1992) (citation omitted). They in no way "eradicate the traditional principle that the Government's consent to be sued must be construed strictly in favor of the sovereign and not enlarged . . . beyond what the language requires." *Ibid.* (citations, internal quotation marks, and brackets omitted).

The Tribe also relies (at 39) on decisions concerning statutes of limitations and certain filing deadlines associated with waivers of immunity. The cited decisions, however, at most suggest that courts should place "greater weight on the equitable importance of treating the Government like other litigants" in the specific context of certain claim-processing rules. *John R. Sand &*

Gravel Co. v. *United States*, 552 U.S. 130, 138 (2008); see *id.* at 136-138 (discussing cases). But where, as in Section 1500, Congress has limited the scope of its consent to suit by expressly restricting the court's "jurisdiction" over claims against the sovereign, those decisions do not affect the traditional and central role played by sovereign-immunity canons.

To be sure, if the text leaves "no ambiguity * * * to construe," the statutory waiver must be enforced. *Richlin Sec. Serv. Co.* v. *Chertoff*, 553 U.S. 571, 590 (2008). But even the Tribe does not contend that Section 1500's text unambiguously supports its position. Congress thus has not waived immunity from suit where, as here, a plaintiff simultaneously pursues two actions sharing substantially the same operative facts.

3. The Tribe contends (at 28-32) that Congress "implicitly ratified" the Court of Claims' interpretation of Section 1500 in *Casman* v. *United States*, 135 Ct. Cl. 647 (1956), because Congress did not amend Section 1500 when it expanded the court's jurisdiction in 1972 or when it divided the Court of Claims into separate trial and appellate courts in 1982. That contention is meritless.

The Tribe relies on *Shepard* v. *United States*, 544 U.S. 13, 23 (2005), which explains that *stare decisis* generally counsels in favor of "adhere[nce] to case law * * * once a decision has a settled statutory meaning." But that doctrine applies only to decisions of this Court, the only Court with final authority to settle the meaning of federal statutes. Cf. *ibid.* And although Congress may implicitly adopt an established statutory interpretation by lower courts when it recodifies the relevant law (as it did in the 1948 codification of Title 28, see *Keene*, 508 U.S. at 209, 212), that principle has no appli-

cation where, as here, Congress "has made only isolated amendments" and "not comprehensively revised a statutory scheme." *Alexander* v. *Sandoval*, 532 U.S. 275, 292 (2001). The 1972 and 1982 revisions that the Tribe invokes are a far cry from the type of recodification that this Court has determined reflects Congress's intent to adopt lower-court rulings in gross. Cf. *Keene*, 508 U.S. 202 n.1, 206 n.2. If the Tribe were correct, those revisions would have ratified the Court of Claims' interpretation of Section 1500 in *Brown* v. *United States*, 358 F.2d 1002 (1966) (per curiam), and *Hossein* v. *United States*, 218 Ct. Cl. 727 (1978) (per curiam). But neither was so ratified and neither "survive[d]" the Court's decision in *Keene*. See 508 U.S. at 215-216, 217 n.12.

C. The Tribe's Policy Arguments Must Be Directed To Congress

The Tribe contends (at 32-35) that applying Section 1500 to preclude CFC jurisdiction here will lead to "unjust" and "absurd" results by depriving litigants of the opportunity "simultaneously to pursue" suits for different types of relief. That concern is exaggerated. A litigant who promptly pursues judicial review of agency action in district court under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, will normally be expected to complete that litigation before the CFC's six-year limitations period expires.

The Tribe contends more specifically (at 33-34) that accepting the government's position will force "regulatory takings plaintiffs" to choose between judicial review of the underlying agency action under the APA and a (simultaneous) takings action in the CFC. That concern is also overstated. This Court need not decide here whether an appropriately tailored APA action seeking to

set aside agency action would preclude a simultaneous claim for just compensation in the CFC. That question would raise a number of issues, not presented in this case, concerning, *inter alia*, Section 1500's application to money-mandating constitutional claims in the CFC when the underlying agency action may be set aside; whether such claims for monetary losses stemming from an alleged impact on the claimant's property sufficiently overlaps with APA review on a particular administrative record of the prospective validity of discrete agency action under governing statutes; and whether regulatory takings claims are themselves sufficiently distinct from the lawfulness of the government action giving rise to them. Cf. *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 536-537, 539 (2005) (explaining that the Just Compensation Clause does not "limit the government['s] interference with property rights" and that takings claims merely address the failure to pay "compensation" for an "otherwise proper interference amounting to a taking") (citation omitted).

Moreover, the Tribe's wide-ranging district court action is unlike APA actions seeking to set aside discrete prospective actions or to enforce specific statutory duties. See *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 62-65 (2004). For instance, an APA suit by the Tribe to enforce a specific statutory right to obtain records in the government's possession or a Freedom of Information Act suit seeking such records—including records pertaining to the government's performance of statutory duties with respect to tribal property—normally would not involve the same "operative facts" as a suit based on past agency actions reflected in such records. But the Tribe's district court action bears no resemblance to that sort of focused APA action. As

explained below (pp. 20-22, *infra*), the Tribe seeks monetary and associated retrospective relief for government actions that purportedly violate trust duties derived from common-law principles. Such claims are not properly brought in an APA action for two reasons: First, federal agencies are creatures of statute, and their duties are defined by specific statutory and regulatory requirements, not by judge-created norms reflecting policy judgments developed at common law for non-sovereign actors. See, *e.g.*, *United States* v. *Navajo Nation*, 129 S. Ct. 1547, 1558 (2009) (rejecting reliance on "common-law trust principles" to impose government duties); Pet. at 21-30, *United States* v. *Jicarilla Apache Nation* (No. 10-382) (filed Sept. 20, 2010). Second, where, as here, a litigant seeks monetary and related retrospective relief for past harms, those claims must be presented to the CFC, as in *Navajo Nation*. The failure to do so here underscores the unusual and overlapping nature of the Tribe's CFC and district court suits.

To the extent a plaintiff must elect between two related actions involving different relief, that election is the consequence of the requirements Congress established in 1868. *Keene* previously addressed "policy arguments" like the Tribe's asserted "hardship" and concluded that "the 'proper theater' for such arguments * * * 'is in the halls of Congress, for that branch of the government has limited the jurisdiction of the Court of Claims.'" 508 U.S. at 217-218 (citations omitted). The Tribe's invocation (at 32-33) of *Casman* reinforces that point. Congress resolved the dilemma in *Casman* in 1972 by *expanding* the CFC's jurisdiction to provide more complete relief. U.S. Br. 33 n.6. Such "policy" judgments lie with Congress, not the courts. *Keene*, 508 U.S. at 217-218 & n.14; U.S. Br. 5, 33-35.

D. This Court Should Reject The Federal Circuit's Flawed Order-Of-Filing Rule

The government's opening brief explains (at 36-39) that *Tecon Engineers, Inc.* v. *United States*, 343 F.2d 943 (Ct. Cl. 1965), cert. denied, 382 U.S. 976 (1966)—which holds that Section 1500 precludes CFC jurisdiction if a plaintiff files his CFC action after filing its district court suit, but not vice versa—cannot be reconciled with the statute's text or history, or this Court's decisions. The Tribe responds (at 40) that *Tecon*'s rule is not before this Court. That is incorrect, and there are sound reasons for this Court to resolve the issue. Pet. 26-28.

The Federal Circuit acknowledged that its decision in *Tecon* has rendered Congress's express limitation on its waiver of immunity a pointless "jurisdictional dance" that no longer serves any meaningful purpose. Pet. App. 17a (citation omitted). Unlike *Keene*, which was decided when *Tecon* had been overruled (U.S. Br. 6), any decision that this Court may now issue interpreting Section 1500's jurisdictional bar would be easily circumvented by litigants strategically ordering their simultaneous suits to take advantage of *Tecon*'s loophole. There is no serious question that this Court has authority to address the Federal Circuit's rationale for its holding in this case, which expressly relies on *Tecon*'s rule to justify dismantling Section 1500's restrictions because, in its judgment, Section 1500 does not preclude "filing two actions seeking the same relief for the same claims." Pet. App. 16a-17a.

Amicus Osage Nation argues (at 13-14) that *Tecon*'s order-of-filing rule simply reflects that a court's jurisdiction depends on the state of things when the action is filed. Although that principle is generally correct, it is

also true that subsequent events may deprive a court of jurisdiction (*e.g.*, mootness). The filing of a related suit in another court while a plaintiff "prosecute[s]" its CFC claim (28 U.S.C. 260 (1946)) similarly triggers Section 1500's jurisdictional bar. U.S. Br. 37-39.

II. THE TRIBE'S SUITS SEEK OVERLAPPING RELIEF

The Tribe argues (at 41-53) that CFC jurisdiction is not precluded under its reading of Section 1500 because its CFC and district court complaints seek "different relief." Section 1500 does not turn on the relief a plaintiff requests. But even if it did, the Tribe's suits involve "at least * * * some overlap in th[at] relief." *Keene*, 508 U.S. at 212.

Like its district court suit, the Tribe's CFC action seeks monetary relief on trust-accounting claims. U.S. Br. 8-10, 46. The CFC complaint alleges that "the [Tribe] has been damaged" by the government's breach of its fiduciary duties to keep "accurate accounts" and furnish "accurate information." Pet. App. 66a-67a. Even without the liberal construction appropriate for pleadings, each count in the complaint expressly incorporates those allegations, and at least two counts specifically assert the failure to provide an "accurate accounting of the revenue the United States *collected*" as part of the purported "mismanagement" of the Tribe's trust. *Id.* at 68a-69a (emphasis added). Those claims obviously are not, as the Tribe contends (at 44-45), limited to "the loss of income it *never earned*" and, in fact, overlap with the Tribe's district court claims concerning "assets it *already owns*." Moreover, the Tribe now admits (at 47-48) that the CFC would have to perform an accounting to calculate damages even for its pure investment-based claims, but stresses that the accounting will occur only

if it establishes liability. See U.S. Br. 47-49. A proper reading of Section 1500, however, must be based on the assumption that a plaintiff prevails on its claims. Otherwise, under the Tribe's logic, its CFC complaint may yield *no* relief whatsoever and, as such, will not (necessarily) produce relief overlapping with any other suit.

The Tribe's district court suit is similar. The Tribe's suggestion (at 48) that the suit merely seeks an accounting for "information" regarding its assets is inaccurate. The complaint alleges that "the true balances of the [Tribe's] trust accounts" are "far greater" than those on government records and specifically requests the "restatement" of those records. Pet. App. 75a, 91a. The Tribe admits (at 10, 50-51) that it also "seeks equitable monetary relief" if "appropriate," *i.e.*, if its allegations are proven. Furthermore, the district court complaint (like the CFC complaint) alleges breaches of a duty to "invest" properly and "maximize" assets, Pet. App. 83a-84a; requests a declaration that the government has breached the "duties [it] owes" and "delineating" such duties (including, "*inter alia*," accounting duties); and seeks equitable relief to address any "fiduciary obligations and otherwise address breaches of trust," *id.* at 90a-91a. See U.S. Br. 6-8, 47.

The Tribe's revisionist reading of its complaints in response to an assertion of Section 1500's jurisdictional bar—and the Federal Circuit's crabbed view that its same-relief inquiry turns only on the relief requested in a complaint's "prayer for relief," Pet. App. 15a—underscore the degree to which the Federal Circuit's interpretation of Section 1500 is fundamentally misguided and susceptible to strategic manipulation. Congress intended Section 1500 to broadly preclude simultaneous lawsuits arising from substantially the same oper-

ative facts. That restriction on Congress's waiver of sovereign immunity from suit in the CFC should be fully enforced.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

SEPTEMBER 2010

APPENDIX

1. The Act of March 30, 1868, J. Res. 25, 15 Stat. 251 (H.R.J. Res. 19, 40th Cong.), provided:

[No. 25.] *Joint Resolution requiring certain Moneys of the United States to be paid into the Treasury, and for other Purposes.*

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That all moneys which have been received by any officer or employe[e] of the government, or any department thereof, from sales of captured and abandoned property in the late insurrectionary districts, under or under color of the several acts of Congress providing for the collection and sale of such property, and which have not already been actually covered into the treasury, shall immediately be paid into the treasury of the United States, together with any interest which has been received or accrued thereon.

SEC. 2. * * * *

SEC. 3. *And be it further resolved*, That a sum of the proceeds of such sales not exceeding seventy-five thousand dollars is hereby appropriated for the payment of the necessary expenses incurred by or under the authority of the Secretary of the Treasury for incidental expenses in acting under the laws respecting the collection and disposition of captured and abandoned property, and for the necessary expenses of defending, in the discretion of the Secretary of the Treasury, such suits as have been brought against him or his agents in the premises, and for prosecuting suits in the United States for the recovery of such property, and for providing for the

defence of the United States against suits for or in respect to such property in the court of claims.

2. Section 8 of the Act of June 25, 1868, ch. 71, 15 Stat. 77 (S. 164, 40th Cong.), provided:

And be it further enacted, That no person shall file or prosecute any claim or suit in the court of claims, or an appeal therefrom, for or in respect to which he or any assignee of his shall have commenced and has pending any suit or process in any other court against any officer or person who, at the time of the cause of action alleged in such suit or process arose, was in respect thereto acting or professing to act, mediately or immediately, under the authority of the United States, unless such suit or process, if now pending in such other court, shall be withdrawn or dismissed within thirty days after the passage of this act.

3. The Act of July 27, 1868, ch. 276, 15 Stat. 243 (H.R. 1131, 40th Cong.), provided:

CHAP. CCLXXVI — *An Act regulating Judicial Proceedings in certain Cases, for the Protection of Officers and Agents of the Government, and for the Defence of the Treasury against unlawful Claims*

* * * * *

SEC. 3. *And be it further enacted*, That it is hereby declared to have been the true intent and meaning of the act approved March twelfth, eighteen hundred and sixty-three, entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States,"

that the remedy given in cases of seizure made under said act, by preferring claim in the court of claims, should be exclusive, precluding the owner of any property taken by agents of the Treasury Department as abandoned or captured property in virtue or under color of said act from suit at common law, or any other mode of redress whatever, before any court or tribunal other than said court of claims; and in all cases in which suits of trespass, replevin, detinue, or any other form of action may have been brought and are now pending, or shall hereafter be brought against any person for or on account of private property taken by such person as an officer or agent of the United States, in virtue or under color of the act aforesaid, or the act approved July second, eighteen hundred and sixty-four, entitled "An act in addition to the several acts concerning commercial intercourse between loyal and insurrectionary States, and to provide for the collection of captured and abandoned property, and the prevention of frauds in States declared in insurrection," the defendant may and shall plead or allege in bar thereof that such act was done or omitted to be done by him as an officer or agent of the United States in the administration of one of the acts of Congress aforesaid, or in virtue or under color thereof, and such plea or allegation, if the fact be sustained by the proof, shall be, and shall be deemed and adjudged in law to be, a complete and conclusive bar to any such suit or action: *Provided, however*, That no judgment, recovered in accordance with this act, shall be paid by the United States, unless the amount received by the defendant as the proceeds of the transaction which was the foundation of the suit shall have been paid into the treasury, except upon an appropriation duly made therefor after a full examination of the claim upon its merits.

AMICUS CURIAE BRIEF

No. 09-846

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

TOHONO O'ODHAM NATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

Robin S. Conrad
Amar D. Sarwal
National Chamber
Litigation Center, Inc.
1615 H St. NW
Washington, DC 20062
(202) 463-5337

Jonathan L. Marcus
Counsel of Record
Theodore P. Metzler
COVINGTON & BURLING LLP
1201 Pennsylvania Ave. NW
Washington, DC 20004
(202) 662-5000

Counsel for Amicus Curiae The Chamber of Commerce of the United States of America

September 2010

5860

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 6

I. The Text And Purpose Of § 1500 Demonstrate That It Removes Jurisdiction Only When A Plaintiff Is Seeking The Same Relief In A Case Pending In Another Court 7

II. The Government's Overly Broad Reading Of § 1500 Would Lead To Unjust Results 12

A. The Government's Interpretation Would Prevent Claimants From Obtaining All The Relief To Which They Are Entitled 12

B. The Government's Interpretation Would Preclude Complete Relief For A Broad Spectrum Of Claimants 15

III. The *Tecon* Order-Of-Filing Rule Is Not Before This Court 21

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Page

Alaska v. *United States*,
32 Fed. Cl. 689 (Fed. Cl. 1995) 20

Barnhart v. *Sigmon Coal Co.*,
534 U.S. 438 (2002) 7

Black v. *Cutter Labs.*, 351 U.S. 292 (1956) 23

Boston Five Cents Savings Bank v. *United States*, 864 F.2d 137 (Fed. Cir. 1988) 20

California v. *Rooney*, 483 U.S. 307 (1987) 23

Casman v. *United States*,
135 Ct. Cl. 647 (1956) 4, 7, 12, 13

Cellco Partnership v. *United States*,
54 Fed. Cl. 260 (Fed. Cl. 2002) 5, 15, 16

Deltona Corp. v. *United States*,
228 Ct. Cl. 476 (Ct. Cl. 1981) 20, 21

eBay Inc. v. *MercExchange, L.L.C.*,
547 U.S. 388 (2006) 14

FCC v. *NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003) 15

Frantz Equipment Co. v. *United States*,
120 Ct. Cl. 312 (Ct. Cl. 1951) 12

Glidden Co. v. *Zdanok*, 370 U.S. 530 (1962) 9

Great-West Life & Annuity Ins. Co. v. *Knudson*, 534 U.S. 204 (2002) 14

Hobbs v. *McLean*, 117 U.S. 467 (1886) 8

Johnson v. *De Grandy*, 512 U.S. 997 (1994) 23

Keene Corp. v. *United States*,
508 U.S. 200 (1993) ..... *passim*

Leocal v. *Ashcroft*, 543 U.S. 1 (2004) 8

Loveladies Harbor, Inc. v. *United States*,
27 F.3d 1545 (Fed. Cir. 1994) 6, 19, 20

Matson Navigation Co. v. *United States*,
284 U.S. 352 (1932) 12, 13

Ross v. *Bernhard*, 396 U.S. 531 (1970) 14

Santa Clara v. *United States*,
215 Ct. Cl. 890 (1977) 5, 17, 18

Tecon Eng'rs, Inc. v. *United States*,
343 F.2d 943 (Ct. Cl. 1965) 6, 21

Tohono O'odham Nation v. *United States*,
559 F.3d 1284 (Fed. Cir. 2009) 23

Truckee-Carson Irrigation Dist.,
223 Ct. Cl. 684 (Ct. Cl. 1980) 21

United States v. *King*, 395 U.S. 1 (1969) 9

UNR Industries, Inc. v. *United States*,
962 F.2d 1013 (Fed. Cir. 1992) 19

Wilson v. *Rousseau*, 45 U.S. 646 (1846) 11

STATUTES & REGULATORY MATERIALS

28 U.S.C. § 1500 ..... *passim*

28 U.S.C. § 1491 ..... 9, 13

Pub. L. No. 92-415, §1, 86 Stat. 652 (1972) 13

OTHER

Paul Frederic Kirgis, *Section 1500 and the Jurisdictional Pitfalls of Federal Government Litigation*, 47 Amer. Univ. L. Rev. 301 (1997) 9, 15

S. Rep. No. 92-1066 (1972) 13

INTEREST OF AMICUS CURIAE[1]

Serving as the principal voice of the business community, the Chamber of Commerce of the United States of America ("the Chamber") is the largest federation of businesses, companies, and associations in the world. With substantial membership in each of the fifty states, the Chamber represents 300,000 direct members and indirectly represents the interests of over three million businesses and organizations of every size, in every business sector and from every region of the country. An important function of the Chamber is to represent the interests of its members in critical issues before the Supreme Court of the United States, the lower courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. The Chamber also seeks to advance those interests by filing briefs in cases of importance to the business community. The Chamber thus has participated as *amicus curiae* in many other cases before this Court, including the related case, *Keene Corp* v. *United States*, 508 U.S. 200 (1993).

Many of the Chamber's members are large and small businesses that have extensive relationships

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[1] Each party has consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

with federal government agencies. These relationships often give rise to claims for damages and equitable relief against the government. Thus, the primary issue presented in this case—whether 28 U.S.C. § 1500 prevents parties with both equitable and money damages claims against the government arising from a common factual nexus from pursuing complete relief—is of great concern to Chamber members.

The membership of the Chamber disagrees with the government's position that § 1500 forces claimants to choose between money damages claims that may be heard only in the Court of Federal Claims and claims for equitable relief that in most instances must be heard in federal district court. That reading of § 1500 is inconsistent with its text and purpose, and would lead to inequitable results.

SUMMARY OF THE ARGUMENT

I. The text and purpose of 28 U.S.C. § 1500 make clear that it does not oust the Court of Federal Claims of jurisdiction over a claim for money damages unless the plaintiff also has pending a suit seeking the same relief against the United States or one of its officers in another court.

Section 1500 employs the word "claim" in its ordinary sense to mean a demand for particular relief, as shown both by this Court's contemporaneous use of the term at the time § 1500 was adopted and by contemporaneous dictionary definitions. In the Court of Federal Claims and its predecessors, a claim for particular relief has always meant a claim for money damages. Thus, the only

claims that are within the court's jurisdiction—and therefore within the scope of § 1500—are claims for money damages. Section 1500 may only divest the claims court of jurisdiction over such a money damages claim if the plaintiff has pending another suit "for" that claim or "in respect to" that claim. A suit "for" a particular monetary damages claim is simply a duplicative suit in another court, whereas a suit "in respect to" a particular money damages claim could differ as to the defendant or the theory of relief.

This reading of the statutory text comports with the original, modest purpose of Section 1500, which Congress enacted to prevent cotton claimants from continuing to file multiple suits to recover money damages for the seizure of their property during the Civil War. Section 1500 therefore divests the claims court of jurisdiction only in those cases where the plaintiff is pursuing the same relief in multiple courts.

Petitioner's contrary argument that § 1500 encompasses cases seeking different relief is unpersuasive. Although the statute does apply to duplicative claims against both a government official and the United States, Petitioner is incorrect that such suits seek "fundamentally different relief." The identity of the defendant does not change the substance of the relief sought. Petitioner is likewise incorrect that § 1500's application to claims brought by a plaintiff's assignee means that it applies to claims seeking different relief. An assignee stands in the shoes of the plaintiff, so an assignee's suit can

seek only the same relief to which the plaintiff is entitled.

2. The government's interpretation of § 1500 would go well beyond the provision's limited purpose to prevent duplicative lawsuits and would instead cut off legitimate claims and subject claimants to arbitrary and inequitable results.

a. More than fifty years ago in *Casman* v. *United States*, the Court of Claims held that § 1500 does not divest the court of jurisdiction if the plaintiff seeks different relief in the claims court[2] than he seeks in another court. 135 Ct. Cl. 647, 648 (1956). In *Casman*, the claims were for back pay and reinstatement of an employee, which could not have been brought together in either the district court or the claims court. Analyzing the text and purpose of the statute, the claims court held that it did not apply to suits separately seeking equitable relief and money damages.

The government now urges this Court to discard that long-established interpretation, arguing that § 1500 should bar even cases seeking different relief so long as the cases are "associated in any way." This interpretation would produce unjust results. Equitable relief and money damages are different by their nature. Where a single factual predicate gives rise to claims for both kinds of relief,

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[2] For simplicity, this brief uses "claims court" to refer to the court known over time as the Court of Claims, the United States Claims Court, and the Court of Federal Claims.

they are not substitutes for one another, but are instead necessary components of providing a complete remedy. Adopting the government's interpretation would go beyond the purpose of § 1500 to force claimants to choose a single forum in which to pursue their money damages claim, and would instead force them to choose between two distinct remedies when Congress has entitled them to both.

b. Cases demonstrating the inequities of the government's position arise in a wide range of circumstances. Where a plaintiff seeks an injunction, declaratory judgment, or the reversal of administrative action against the government in district court, there often is also a claim for damages caused by the government action the plaintiff seeks to prevent or reverse.

For example, in *Cellco Partnership* v. *United States*, the FCC's inability to deliver reauctioned wireless spectrum licenses to the successful bidder gave rise to both a claim challenging the administrative decision not to provide a full refund of the bidder's deposit and a claim for money damages caused by the failure to deliver the licenses. 54 Fed. Cl. 260 (Fed. Cl. 2002). Similarly, in *Santa Clara* v. *United States*, a federal electricity provider's refusal to deliver power to a municipality gave rise to both an equitable claim to ensure the provision of certain power levels and a contract claim for overpayments the city made to another provider to compensate. 215 Ct. Cl. 890 (1977). And in *Loveladies Harbor, Inc.* v. *United States*, the Army Corps of Engineers' denial of a fill permit generated both an administrative claim seeking to reverse the decision

and a constitutional damages claim for an uncompensated taking. 27 F.3d 1545 (Fed. Cir. 1994).

These cases show that adopting the government's position would have a devastating effect on the ability of many claimants to obtain the full relief that Congress has authorized. The government's interpretation should be rejected because it would improperly transform a limited measure to protect against duplicative claims into a sweeping bar that strikes down legitimate claims and prevents full relief.

3. The rule of *Tecon Engineers, Inc.* v. *United States*, 343 F.2d 943 (Ct. Cl. 1965), is not before this Court. *Tecon* held that § 1500 does not divest the claims court of jurisdiction where the plaintiff had no other suit pending in another court at the time the claims court case was filed, even if a duplicative case is filed during the course of the litigation. Because Respondent filed its district court action *before* filing in the Court of Federal Claims, the *Tecon* order-of-filing rule is not implicated here.

ARGUMENT

Section 1500 of Title 28 was enacted to solve the narrow problem of duplicative suits brought by "cotton claimants" to recover damages for property seized during the Civil War. *Keene Corp.* v. *United States*, 508 U.S. 200, 206 (1993). Because they were entitled to recover in the Court of Claims only if they could prove that they had not provided aid to the Confederacy, many of the cotton claimants also sought to recover the same relief by suing the

Treasury officers who had seized their property in their local courts. *Id.* The predecessor to § 1500 was enacted to curb this duplicative litigation. *Id.*

Section 1500 solves the problem of duplicative litigation by divesting the Court of Federal Claims of jurisdiction over "any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person . . . acting or professing to act . . . under the authority of the United States." 28 U.S.C. § 1500. For more than 50 years, the claims court has held that this language does not divest the court of jurisdiction where a case pending in another court arises from the same facts but seeks different relief than the claims court case. *See Casman* v. *United States*, 135 Ct. Cl. 647 (1956). As explained below, there is no reason to disturb that well-established rule.

I. The Text And Purpose Of § 1500 Demonstrate That It Removes Jurisdiction Only When A Plaintiff Is Seeking The Same Relief In A Case Pending In Another Court.

"As in all statutory construction cases," the Court "begin[s] with the language of the statute." *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). Section 1500 of Title 28 states:

> "The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process

> against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States."

Section 1500 thus divests the Court of Federal Claims of jurisdiction over a "claim" if the plaintiff has a suit pending in another court against the United States "for" that claim or "in respect to" that claim.

Respondent persuasively explains that § 1500 uses the term "claim" in its ordinary sense to mean a demand for particular relief, and that the contemporaneous usage and definitions of the term at the time § 1500 was enacted demonstrate that "claim" referred to a demand for some specific thing. Resp. Br. 17-19. This Court too applied that usage, observing that it was well understood that a "claim against the United States" meant "a right to demand money from the United States." *Hobbs* v. *McLean*, 117 U.S. 567, 575 (1886).

This Court "construe[s statutory] language in its context and in light of the terms surrounding it." *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004).[3] The

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[3] As Respondent correctly argues, the Court should use the ordinary tools of statutory construction rather than the canon of narrowly construing waivers of sovereign immunity to interpret the language of § 1500. *See* Resp. Br. 36-40. While Section 1500 removes the Court of Federal Claims' jurisdiction in (continued...)

relevant context here is the jurisdiction of the Court of Federal Claims, which is the subject matter of § 1500. The only "claims" that § 1500 can remove from the Court of Federal Claims' jurisdiction are claims that would be within the court's jurisdiction in the first place. "Throughout its entire history," with very few exceptions, the Court of Federal Claims' "jurisdiction has been limited to money claims against the United States Government." *United States* v. *King*, 395 U.S. 1, 3 (1969); *see Glidden Co.* v. *Zdanok*, 370 U.S. 530, 557 (1962) ("From the beginning [the claims court] has been given jurisdiction only to award damages, not specific relief."). Indeed, the court was originally known as the "Court of *Claims*" and is now known as the "Court of Federal *Claims*." Since its inception, the "claims" part of the court's name has always referred to claims for money damages. Thus, the only claims that are eligible to be precluded by § 1500 are claims for money damages.[4]

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specific cases, nothing in the text or history of the statute implies, much less establishes, that the intent was to withdraw the waiver of sovereign immunity that otherwise applies. Moreover, the government's sovereign immunity interpretation of § 1500 is incongruous in that the supposed retraction of the sovereign immunity waiver would not apply if the district court litigation were completed before suit is filed in the claims court.

[4] The limited exceptions to this principle are a government employee's claim for reinstatement, which may now be brought in the claims court along with a claim for back pay, *see infra*, n. 5, certain claims for reformation or rescission incidental to the money damages remedy in contract actions, and injunctive relief in bid protest cases. *See* Paul Frederic Kirgis, *Section* (continued...)

Section 1500 bars jurisdiction in the Court of Federal Claims when the plaintiff has pending in a different court another suit "for" the money damages claim or "in respect to" the money damages claim. While, as this Court has stated, the inclusion of the phrase "in respect to " ensures that the statute will not be "rendered useless by the narrow concept of identity," *Keene*, 508 U.S. at 213, the phrase does that work by reaching not only claims that are identical in all respects, but also claims seeking the same relief for the same injury that are premised on a different legal theory or brought against different federal defendants. *See* Resp. Br. 23-24. That interpretation also accords with the purpose of § 1500, which was meant to preclude the "duplicative lawsuits" that cotton claimants had been filing to obtain compensation for the seizure of their property during the Civil War. *Keene*, 508 U.S. at 206. Such suits were problematic because they sought duplicative recovery for the same injury. If the pending suit seeks *different* relief, therefore, § 1500 does not apply.

The government attempts to rebut this conclusion by arguing that § 1500 "expressly refers" to actions that grant different forms of relief, but those arguments fall flat. *See* Pet. Br. 23-24. Noting that § 1500 precludes jurisdiction where the other pending case seeks relief against a government officer rather than the United States, the

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1500 and the Jurisdictional Pitfalls of Federal Government Litigation, 47 Amer. Univ. L. Rev. 301, 312 & n.70 (1997); 28 U.S.C. § 1491(b).

government asserts that "[a] suit against an individual agent yields fundamentally different relief than a suit against the United States, even when both suits pursue monetary claims." Pet. Br. 23. This is ostensibly true because a judgment against an individual must be paid out of that person's assets whereas a judgment against the government is paid with federal funds. *Id.* at 23-24. But whatever practical effect the source of funds may have on the plaintiff's ability to collect, it is not normally a feature of the relief the plaintiff seeks. For example, it would not be said that two plaintiffs seeking identical damages for identical slip-and-fall accidents are seeking "fundamentally different" relief because one of the defendants has insurance that will pay the judgment while the other defendant does not.

The government similarly contends that § 1500 expressly applies to claims seeking different relief because it includes within its scope pending cases brought by a plaintiff's assignee, Pet. Br. 24, but that argument too misses the mark. When a plaintiff assigns his claim, the assignee stands in the shoes of the plaintiff, and his right to recovery can be no greater than the plaintiff's. *See, e.g., Wilson* v. *Rousseau*, 45 U.S. 646, 703 (1846). The relief ordered to the assignee is thus relief to which the plaintiff is entitled, and the assignee's right to the relief is limited by the plaintiff's own right as well as the scope of the assignment. *See id.* The inclusion of assignee cases within the scope of suits that can trigger § 1500 thus does not extend the jurisdictional bar to cases seeking different relief from the Court of Federal Claims case. Rather, it forecloses a potential loophole through which a plaintiff might attempt to

bring duplicative litigation in both the Court of Federal Claims and another court.

II. The Government's Overly Broad Reading Of § 1500 Would Lead To Unjust Results.

A. The Government's Interpretation Would Prevent Claimants From Obtaining All The Relief To Which They Are Entitled.

In 1956, the Court of Claims first considered whether § 1500 applied to a case brought in that court for money damages where the plaintiff had also brought suit in the district court seeking equitable relief. *Casman* v. *United States*, 135 Ct. Cl. 647 (Ct. Cl. 1956). The plaintiff alleged that he was wrongfully terminated from his position with the federal government and sought back pay in the Court of Claims. *Id.* at 648. The plaintiff also sued in the District Court, alleging the same facts but seeking only reinstatement to his former position. *Id.* On the government's motion to dismiss for lack of jurisdiction, the Court of Claims found that the purpose of § 1500 "was to prohibit the filing and prosecution of the same claims against the United States in different courts at the same time." *Id.* (quoting *Frantz Equip. Co.* v. *United States*, 120 Ct. Cl. 312, 314 (Ct. Cl. 1951)).

The court also emphasized this Court's statement that the purpose of § 1500 "was only to require an election between a suit in the Court of Claims and one brought in another court." *Id.* at 649 (quoting *Matson Navigation Co.* v. *United States*, 284 U.S. 352, 355-56 (1932)). The plaintiff in *Casman* had no ability to "elect between courts" because his

claim for back pay could be brought only in the claims court whereas his claim for reinstatement could be brought only in the district court. The Court of Claims accordingly held that § 1500 did not divest it of jurisdiction over the back pay claim. "To hold otherwise would be to say to plaintiff, 'If you want your job back you must forget your back pay'; conversely, 'if you want your back pay, you cannot have your job back.'"[5] *Id.* at 650. The claims court has faithfully adhered to this interpretation of § 1500 for more than fifty years.[6]

The government now seeks to put claimants in the dilemma that would have faced the plaintiff in *Casman* had the government's interpretation prevailed. The government argues that § 1500 strips

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[5] Congress subsequently permitted these sorts of employment claims to be brought together in the claims court. Pub. L. No. 92-415, § 1, 86 Stat. 652 (1972) (codified at 28 U.S.C. § 1491(a)(2)).

[6] In the decades since *Casman* was decided, § 1500 has been amended twice, yet Congress has never acted to modify or repeal that decision's limitation on § 1500. *See* Resp. Br. 30-32. In contrast, when Congress reenacted § 1500 in 1948, it modified the statute to close a loophole this Court found in *Matson Navigation Co. v. United States*, 284 U.S. 352 (1932) (holding that § 1500 did not apply where duplicative claim was brought against the United States, rather than its agent, in another court). *See Keene*, 508 U.S. at 210 n.5. Moreover, when Congress did react to *Casman*, it acknowledged that claims for reinstatement and back pay required two lawsuits. *See* S. Rep. No. 92-1066, at 2 (1972). Instead of overruling *Casman*, however, Congress made it easier for individuals to bring such suits by permitting both claims to be pursued in the claims court. *See supra* n.5.

the claims court of jurisdiction where another pending case "relates to" or is "associated in any way" with the Court of Federal Claims case. Pet. Br. 21. That expansive interpretation would divest the claims court of jurisdiction in a wide swath of cases where a plaintiff's relationship with the government gives rise to both equitable claims and to claims for money damages. In such cases, the government's interpretation would deny claimants the full relief to which they are entitled.

That is because equitable relief and money damages are by their nature different forms of relief. *See, e.g., Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 210 (2002) (claim for money damages is not equitable in nature); *Ross* v. *Bernhard*, 396 U.S. 531, 542 (1970) (holding that shareholders' derivative suit was legal rather than equitable in nature because "[t]he relief sought is money damages"). Indeed, the very availability of equitable relief is premised on the notion, and hinges on a showing, that monetary damages are inadequate. *See, e.g., eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) ("According to well established principles of equity . . . [a] plaintiff must demonstrate . . . [that] monetary damages are inadequate" to obtain an injunction.). When both equitable remedies and money damages arise from the same factual nexus, they typically are not interchangeable but rather complement one another to afford a claimant the full relief to which he is entitled. In such cases, one or the other form of relief by itself would be incomplete.

B. The Government's Interpretation Would Preclude Complete Relief For A Broad Spectrum Of Claimants.

Cases in which money damages and equitable relief against the government must be pursued in separate courts to obtain complete relief commonly arise where the plaintiff has a claim in the district court seeking an injunction, a declaratory judgment, or the reversal of administrative action. *See* Paul Frederic Kirgis, *Section 1500 and the Jurisdictional Pitfalls of Federal Government Litigation*, 47 Amer. Univ. L. Rev. 301, 340 (1997). In such cases, the government's interpretation of § 1500 would bar the claimant from receiving the complete relief to which it is entitled.

An illustrative case is *Celico Partnership v. United States*, 54 Fed. Cl. 260 (Fed. Cl. 2002). *Celico* involved the wireless spectrum license auction that became the subject of this Court's decision in *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003). NextWave was awarded a large number of broadband spectrum licenses as the successful bidder in the FCC's spectrum auction, with its bids totaling nearly $5 billion. *Id.* at 297. NextWave subsequently encountered difficulty financing the licenses and entered bankruptcy proceedings. *Id.* The FCC eventually canceled the licenses of NextWave and another company for failure to make the agreed payments and reauctioned those licenses. *Celico*, 54 Fed. Cl. at 261. The successful bidder was Celico Partnership (also known as Verizon Wireless). *Id.* Verizon paid a $1.7 billion deposit to the FCC on its $8.69 billion bid. *Id.*

The FCC was unable to deliver the licenses to Verizon, however, because NextWave successfully challenged the FCC's cancellation of the licenses in the D.C. Circuit. *Id.* At the same time, the FCC issued an order that only partially refunded Verizon's deposit, and it also refused to release Verizon from the contract requiring payment in full of the $8 billion bid amount within 10 days if and when the FCC reclaimed the licenses from NextWave. *Id.* at 261, 263. Verizon filed a petition for review of the FCC's order in the D.C. Circuit, asserting that the order was unlawful. Verizon also brought suit in the Court of Federal Claims, the only court in which it could seek money damages resulting from the FCC's failure to deliver the licenses. The government moved to stay the claims court action while the district court case was pending, but the court denied the motion, emphasizing that "the D.C. Circuit lacks jurisdiction to decide plaintiffs money damages claim." *Id.* at 263. The court observed that "[e]ven if the FCC agreed to fully refund the deposits, such action would not legally dispose of plaintiff's breach of contract and damages claims." *Id.*

Cellco demonstrates the inequities that would result from the government's interpretation of § 1500. Verizon faced a situation in which it was required to keep a multi-billion dollar liability on its books indefinitely, but could not obtain the benefit of using the wireless spectrum that money was meant to purchase. *See id.* If § 1500 were interpreted to divest the Court of Federal Claims of jurisdiction when any matter "associated in any way" with the Court of Federal Claims case is pending, a company

in such a bind could pursue either the reversal of the administrative decision putting it in that bind, or the damages it incurs, but not both.

Similar problems arise when the plaintiff seeks an injunction in another court before bringing a case in the claims court. In one such case, *Santa Clara* v. *United States*, 215 Ct. Cl. 890, 891 (1977), the city of Santa Clara, California, had entered into a contract with the Central Valley Project ("CVP"), a federally owned water conservation project, to purchase electricity directly instead of through an intermediary. *Id.* at 891. When CVP began withholding electricity from Santa Clara, the city was forced to purchase electricity from the intermediary at six times the price. *Id.* Santa Clara sued in federal district court for equitable relief—a declaration that it was entitled to receive power from CVP and an injunction preventing CVP from refusing to allocate power to the city. *Id.* After the district court remanded the case to the Department of the Interior, Santa Clara brought suit in the claims court seeking damages against the United States for breach of contract. *Id.* at 892.

The Court of Claims denied the government's motion for summary judgment based on § 1500. The court explained that "plaintiff should [not] be denied the right ever to claim money damages merely because it also seeks to enjoin the Government from

future power allotment violations by requesting injunctive relief in district court." *Id.* at 892.[7]

As in *Cellco*, *Santa Clara* shows the potential danger and injustice that would result from adopting the government's interpretation of § 1500. In *Santa Clara*, the city was faced with two distinct but related problems: *First*, the power authority was not providing the amount of electricity that the city believed it was entitled to. *Second*, the city was paying a significantly higher rate for electricity than it believed it was entitled to. Under the government's view of § 1500, the city would have been forced to forego any claim for damages against the government so long as its suit to enjoin the power authority from withholding electricity was pending. Alternatively, the city could pursue its claim for money damages, but only if it relinquished the right to a declaration of its rights and an injunction preventing the water authority from continuing or resuming the practice.

These same concerns arise in cases in which federal regulatory action is challenged as effecting a taking of private property without compensation. For example, in *Loveladies Harbor, Inc.* v. *United States*, the plaintiff was denied a Clean Water Act fill permit from the Army Corps of Engineers in

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[7] The court ultimately stayed the damages suit because of "unique circumstances" consisting of an escrow agreement between the city and the intermediary power provider that meant that the city could obtain the return of its overcharges as a result of the district court litigation. 215 Ct. Cl. at 891, 893.

connection with a development project. 27 F.3d 1545, 1547 (Fed. Cir. 1994) (en banc). The plaintiff appealed the Corps' decision to the Third Circuit, which affirmed, and also proceeded with a suit in the Court of Federal Claims alleging that the permit denial constituted a taking. *Id.* The Court of Federal Claims held that the permit denial was a taking and awarded $2.6 million in compensation. On appeal to the Federal Circuit, the government moved to vacate the judgment on the ground that § 1500 barred the regulatory takings claim because the Court of Federal Claims suit was filed while the Third Circuit appeal was still pending.[8] *Id.*

Loveladies provides a stark illustration of how the government's interpretation of § 1500 would harm claimants. The claimant in *Loveladies* lost the administrative challenge, but won a $2.6 million judgment on the claim that the regulation effected a taking. Had the government's interpretation of § 1500 prevailed, Loveladies would have lost the $2.6 million not because there had been no taking, but instead because it guessed wrong as to which claim for relief was more likely to be successful. As the Federal Circuit stated, "[p]laintiffs such as

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[8] The government's motion followed the en banc decision of the Federal Circuit in *UNR Industries, Inc.* v. *United States*, 962 F.2d 1013 (Fed. Cir. 1992), which purported to overrule *Casman*. *UNR*, 962 F.2d at 1022 n.3. This Court's decision in *Keene*, which reviewed the *UNR* decision, noted that the *Casman* rule was not implicated in that case. 508 U.S. at 213 n.6. In *Loveladies*, the en banc Federal Circuit reaffirmed *Casman*. 27 F.3d at 1551.

Loveladies, too, have a right to have the Corps' permit denial reviewed, without being placed in the position of having to give up substantial legal rights protected by the Takings Clause of the Constitution." 27 F.3d at 1555.

These adverse consequences would also arise in many other cases. To catalog just a few:

- In *Alaska* v. *United States*, 32 Fed. Cl. 689 (Fed. Cl. 1995), the state of Alaska filed in district court a constitutional challenge to federal regulatory restrictions on the export of crude oil and later filed a claim in the Court of Federal Claims for compensation in money damages for a regulatory taking. *Id.* at 695-97.

- *In Boston Five Cents Savings Bank* v. *United States*, 864 F.2d 137 (Fed. Cir. 1988), the plaintiff bank sought a declaratory judgment in district court that the Department of Housing and Urban Development would violate a mortgage agreement with the bank if the agency were to allow a particular property to be converted to a co-op. *Id.* at 138. The bank subsequently sued in the claims court for monetary damages. *Id.* at 139.

- In *Deltona Corp.* v. *United States*, 228 Ct. Cl. 476, 482 (Ct. Cl. 1981), like *Loveladies*, a property developer both challenged the denial of a permit from the Army Corps of Engineers in district court and later sued in the Court of Claims, alleging that the federal regulation of

his land constituted an uncompensated taking of his property. *Id.* at 485.

- *In Truckee-Carson Irrigation Dist.*, 223 Ct. Cl. 684 (Ct. Cl. 1980), the plaintiff sought injunctive and declaratory relief in the district court, and contract damages in the claims court, related to federal actions with respect to the use of project waters for the production of power during the winter months. *Id.* at 684.

As these cases demonstrate, adopting the government's far-reaching interpretation of § 1500 would have a devastating effect on the ability of claimants to obtain the full relief that Congress has made available across a wide range of cases. This Court should reject the government's attempt to transform a provision that was designed to be a shield against duplicative claims into a sword that prevents plaintiffs from obtaining complete relief from the government's constitutional, statutory, and contractual violations.

III. The *Tecon* Order-Of-Filing Rule Is Not Before This Court.

In *Tecon Engineers, Inc.* v. *United States*, the Court of Claims held that because jurisdiction is determined at the time of filing, § 1500 does not divest the court of jurisdiction if no other suit is pending when a case is filed in the claims court, even if such a suit is filed later. 343 F.2d 943, 949 (Ct. Cl. 1965). While admitting that *Tecon* "does not directly apply to this case," the government nevertheless urges the Court to overrule the case. *See* Pet. Br. 37

& n.8. The Court should decline to do so because the order-of-filing rule is not presented here.

Respondent initially sued the government in the District Court for the District of Columbia on December 28, 2006, and filed its second suit in the Court of Federal Claims "one day later." Pet. Br. 6. The district court case thus was commenced before the claims court case, and no party suggests otherwise. *Id.* at 6, 37 n.8. The exception to § 1500 stated in *Tecon*, however, applies only if the opposite is true, when the claims court case is filed *before* the district court case. 343 F.2d at 949. These facts thus do not raise the issue of whether § 1500 divests the claims court of jurisdiction if a duplicative claim is later filed in another court.

This Court has already expressly declined to address *Tecon* where the facts did not implicate the issue. *Keene*, 508 U.S. at 216. In *Keene*, as here, the Plaintiff did not address *Tecon* on the merits, and the United States admitted that *Tecon* "would not apply." Resp. Br., *Keene Corp.* v. *United States*, No. 92-166, at 36-37. Although the government argued that *Tecon* was wrongly decided, this Court correctly found it "unnecessary to consider, much less repudiate" *Tecon* (508 U.S. at 216), because "this case does not raise that issue." (*id.* at 209 n.4 (citations omitted)). For the same reason, the Court should decline to address *Tecon* here.

As this Court has repeatedly observed, "[t]his Court 'reviews judgments, not statements in opinions.'" *Johnson* v. *De Grandy*, 512 U.S. 997, 1003 n.5 (1994) (quoting *California* v. *Rooney*, 483

U.S. 307, 311 (1987) (per curiam) and *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956)). Although the Federal Circuit cited *Tecon* in response to the government's policy arguments for its far-reaching interpretation of § 1500, *see Tohono O'odham Nation* v. *United States*, 559 F.3d 1284, 1291-92 (Fed. Cir. 2009), *Tecon* did not determine the outcome of this case—and could not have done so—because it applies only to cases with different facts. Because the *Tecon* rule is not implicated here, the Court should not reach out to address it.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

Robin S. Conrad
Amar D. Sarwal
National Chamber
Litigation Center, Inc.
1615 H St. NW
Washington, DC 20062
(202) 463-5337

Jonathan L. Marcus
Counsel of Record
Theodore P. Metzler
Covington & Burling LLP
1201 Pennsylvania Ave. NW
Washington, DC 20004
(202) 662-5000

Counsel for Amicus Curiae
The Chamber of Commerce of
the United States of America

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AMICUS CURIAE BRIEF

No. 09-846

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

TOHONO O'ODHAM NATION, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR *AMICI CURIAE* COLORADO RIVER INDIAN TRIBES AND NATIONAL CONGRESS OF AMERICAN INDIANS SUPPORTING RESPONDENT

STEVEN D. GORDON
Counsel of Record
STEPHEN J. MCHUGH
HOLLAND & KNIGHT LLP
2099 Pennsylvania Ave., NW
Washington, D.C. 20006
202-955-3000
steven.gordon@hklaw.com

Counsel for Amici Curiae

TABLE OF CONTENTS

INTEREST OF AMICI CURIAE ..... - 1 -

SUMMARY OF ARGUMENT ..... - 3 -

ARGUMENT ..... - 6 -

I. SECTION 1500 DOES NOT BAR SUITS THAT SEEK DIFFERENT RELIEF ..... - 6 -

II. A SUIT FOR AN ACCOUNTING IN DISTRICT COURT SEEKS DIFFERENT RELIEF THAN A DAMAGES SUIT IN THE CFC ..... - 12 -

A. Tribes Seek An Accounting To Obtain Essential Information About Their Trust Property ..... - 12 -

B. The CFC Cannot Order A Trust Accounting ..... - 18 -

C. Tribal Suits For A Trust Accounting Do Not Trigger Section 1500 ..... - 20 -

III. A SUIT FOR AN ACCOUNTING IS NOT BASED ON THE SAME OPERATIVE FACTS AS A DAMAGES SUIT FOR BREACH OF TRUST ..... - 22 -

CONCLUSION ..... - 24 -

TABLE OF AUTHORITIES

Page(s)

CASES

Allied Materials & Equip. Co., Inc. v. United States, 210 Ct. Cl. 714 (1976) 8

Allstate Financial Corp. v. United States, 29 Fed. Cl. 366 (1993) 22

Casman v. United States, 135 Ct. Cl. 647 (1956) 4, 7, 8, 9

Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001) 15

Colorado River Indian Tribes v. Salazar, Case No. 06-CV-2212 (D.D.C.) 2

Colorado River Indian Tribes v. United States, No. 06-901 L (CFC) 2

Deltona Corp. v. United States, 222 Ct. Cl. 659 8

Eastern Shawnee Tribe of Oklahoma v. United States, 582 F.3d 1306 (Fed. Cir. 2009) 18

James v. Caldera, 159 F.3d 573 (Fed. Cir. 1998) 18

Kaiser Alum. & Chem. Corp. v. Bonjorno, 494 U.S. 827 (1990) 9

Keene Corp. v. United States,
508 U.S. 200 (1993) 6, 7, 10

Lion Raisins, Inc. v. United States,
416 F.3d 1356 (Fed.Cir.2005) 18

Loveladies Harbor, Inc. v. United States,
27 F.3d 1545 (Fed. Cir. 1994) (*en banc*) ... 6, 7, 23

Martinez v. United States,
333 F.3d 1295 (Fed.Cir.2003) 19

River Home & Agricultural Coop. v. United States, 215 Ct. Cl. 959 (1977) 8

Shoshone Indian Tribe v. United States,
364 F. 3d 1339 (Fed. Cir. 2004) 20

Truckee-Carson Irrigation Dist. v. United States, 223 Ct. Cl. 684 (1980) 8

United States ex rel. Garst v. Lockheed-Martin Corp., 328 F.3d 374 (7th Cir. 2003) 23

United States v. John C. Grimberg Co., Inc.,
702 F.2d 1362 (Fed. Cir. 1983) 11

STATUTES

5 U.S.C. §§551-559 2

25 U.S.C. § 4011 14

25 U.S.C. § 4022 17

25 U.S.C. § 4044 14

28 U.S.C. § 1361 2

28 U.S.C. § 1491 ..... 2, 10, 18

28 U.S.C. § 1500 ..... passim

28 U.S.C. § 1505 2

28 U.S.C. § 2401(a) 21

28 U.S.C. § 2501 21

Pub. L. No. 92-415, 86 Stat. 652 (1972) 9

Pub. L. No. 97-164, § 133, 96 Stat. 25, 39-41 (1981) 9, 11

Pub. L. No. 100-202, 101 Stat. 1329 (1987) 14

Pub. L. No. 101-121, 103 Stat. 701 (1989) 14

Pub. L. No. 101-512, 104 Stat. 1915 (1990) 20

Pub. L. No. 102-154, 105 Stat. 990 (1991) 20

Pub. L. No. 102-381, 106 Stat. 1374 (1992) 20

Pub. L. No. 103-138, 107 Stat. 1379 (1993) 20

Pub. L. No. 103-332, 108 Stat. 2499 (1994) 20

Pub. L. No. 104-134, 110 Stat. 1321 (1996) 20

Pub. L. No. 107-153, § 1, 116 Stat. 79 (2002)..... 21

OTHER AUTHORITIES

Court of Appeals for the Federal Circuit – 1981, Hearings on H.R. 2405 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. On the Judiciary, 97th Cong., 1st Sess. 212 (1981) 11

G. Bogert *et al.*, *The Law of Trusts and Trustees* § 963 (2d ed. 1983) 13

H.R. Rep. No. 102-499 (1992) 13

Restatement (Second) of Trusts, § 199 (1959) 17

Restatement (Third) of Trusts § 83 (2007)..... 13

S. 1700 10

S. Rep. 92-1066, *reprinted in* 1972 U.S.C.C.A.N. 3116 9

S. Rep. 97-275 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11 ..... 4, 10

U.S. General Accounting Office, *Financial Management: BIA's Tribal Trust Fund Account Reconciliation Results* GAO/AIMD 96-63 (May 3, 1996) 16

INTEREST OF AMICI CURIAE

The Colorado River Indian Tribes ("CRIT") and the National Congress of American Indians ("NCAI"), as *amici curiae*, respectfully submit this brief in support of Respondent and urge affirmance of the Federal Circuit's decision in *Tohono O'odham Nation v. United States.*[1]

CRIT is a federally recognized Indian tribe whose reservation straddles the lower Colorado River for approximately 55 miles in Arizona and California and contains over 264,000 acres. The reservation was established to provide a homeland for Native Americans living along the river. Tribal lands produce sand and gravel and are leased to third parties for agricultural and commercial uses. The United States acts as trustee for these tribal lands and mineral rights and for monies belonging to the tribe that are held in trust.

On December 27, 2006, CRIT filed two different actions – in the district court and the Court of Federal Claims ("CFC") -- related to the

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[1] Pursuant to Rule 37.6, *amici curiae* certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici* and their counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk pursuant to Rule 37.3.

government's performance of its duties as trustee for the tribe. Like the Tohono O'odham Nation ("Nation") and other Indian tribes, CRIT filed this pair of actions because, given the applicable jurisdictional limitations, both actions were necessary to obtain complete relief.

One complaint was filed in the District Court for the District of Columbia pursuant to the Administrative Procedure Act ("APA")[2] and 28 U.S.C. § 1361. *Colorado River Indian Tribes v. Salazar*, Case No. 06-CV-2212 (D.D.C.). It alleged that the federal defendants had failed to provide CRIT with a full and complete accounting of CRIT's trust funds and assets and sought a declaratory judgment to that effect. It also sought an injunction compelling such an accounting. The complaint did not seek any monetary relief.

The second complaint was filed in the CFC pursuant to the Tucker Act[3] and the Indian Tucker Act.[4] *Colorado River Indian Tribes v. United States*, No. 06-901 L (CFC). It alleged that the government has mismanaged CRIT's trust assets in various ways and sought an award of damages. CRIT has an obvious interest in whether this suit is precluded by 28 U.S.C. § 1500.

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[2] 5 U.S.C. §§ 551-559, 701-706.

[3] 28 U.S.C. § 1491.

[4] 28 U.S.C. § 1505.

NCAI is the oldest and largest national organization representing Indian tribal governments, with a membership of more than 250 American Indian tribes and Alaska Native villages. NCAI was established in 1944 to protect the rights of Indian tribes and improve the welfare of American Indians.

The government holds almost 56 million acres of land in trust for Indian tribes or their members, and manages those tribal lands and natural resources. In addition, the government holds approximately $2.9 billion in trust for tribes. Regulation, preservation and management of these lands and resources are essential governmental functions of the tribes, and tribal governments are increasingly taking over trust asset management under tribal self-determination statutes. Tribal governments – and NCAI -- have a keen interest in the decisions of this Court that affect the functioning of the Indian trust system, tribes' ability to receive an accounting of their trust assets, and tribes' ability to recover damages for mismanagement of those assets.

SUMMARY OF ARGUMENT

The Federal Circuit correctly decided that Section 1500's prohibition of duplicative claims based on the same operative facts does not preclude the Nation from seeking damages for breach of trust in the CFC and an equitable trust accounting in the district court.

1. The Federal Circuit's decision relies on the settled interpretation of Section 1500, deriving from *Casman v. United States*, 135 Ct. Cl. 647 (1956), that the prohibition on duplicative suits does not apply where a plaintiff seeks different relief in the two courts. The Government's construction of 28 U.S.C. § 1500 would cast aside this interpretation and preclude any suits in the CFC that are "associated in any way" with a suit in another court, even if they seek entirely different relief. But Congress acknowledged, and implicitly approved of, the use of parallel suits to obtain damages and equitable relief when it created the Claims Court (now the CFC) in 1982 and revised Section 1500 to apply to the new court. Congress considered, but did not adopt, a provision that would have empowered the Claims Court to grant declaratory and equitable relief in all Tucker Act cases in order to "avoid the costly duplication in litigation presently required when a citizen seeks both damages and equitable relief against the government." S. Rep. 97-275, at 19 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 32. In doing so, Congress never suggested that such related suits are prohibited by Section 1500. To the contrary, Congress pondered whether it should act to reduce the need for this parallel litigation by enhancing the remedial powers of the Claims Court.

2. Indian tribes are entitled to receive a trust accounting from the government, *i.e.* a detailed account of the trust receipts, disbursements, and property on hand, from which the tribe can assess

the status of the trust and whether it has been properly managed. The CFC cannot compel such an accounting. Because a trust accounting is distinct from and provides different relief than an action for money damages, a district court action seeking an accounting does not trigger Section 1500 and preclude an action for damages in the CFC. This conclusion does not change where, as here, the district court complaint also seeks associated equitable monetary relief that does not overlap with the damages sought in the CFC action.

3. A tribal claim for a trust accounting is based on different operative facts than a damages claim for breach of trust in the CFC. A claim for an accounting is based on two operative facts: (i) the government holds property in trust for the tribe and (ii) the government has not provided an accounting. In contrast, a damages claim for breach of trust is based on allegations that (i) the government has mismanaged tribal trust assets and (ii) the tribe has suffered damages as a result. This reinforces the conclusion that a tribal action for an accounting does not bar a separate claim for damages in the CFC under Section 1500.

ARGUMENT

I. SECTION 1500 DOES NOT BAR SUITS THAT SEEK DIFFERENT RELIEF

Section 1500 provides that the CFC "shall not have jurisdiction of any claim ... for or in respect to which the plaintiff ... has pending in any other court any suit or process against the United States or [an officer or agent of the United States]." In *Keene Corp. v. United States*, 508 U.S. 200 (1993), this Court construed Section 1500 to bar suits in the CFC that arise from the same operative facts and seek the same relief as a pending district court action, even if the CFC suit is premised on different legal theories than those advanced in the district court. *See id.* at 212. The Court noted that this was the settled judicial construction of the predecessor to Section 1500 and reasoned that Congress had effectively adopted this construction when it reenacted the statute in 1948. *Id.*

The Court in *Keene* left open the question whether Section 1500 is implicated where two actions are based on the same operative facts but seek different relief. *Id.* at 213 n.6 & 216. Shortly thereafter, the Federal Circuit ruled that Section 1500 does not apply where the claims in the two courts are for different relief, even if they arise from the same operative facts. *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545 (Fed. Cir. 1994) (*en banc*). *Loveladies* reaffirmed the long-standing

construction of Section 1500, first articulated in 1956 in *Casman*.

In this case, the Federal Circuit followed *Loveladies* and held Section 1500 inapplicable because the Nation's CFC complaint seeks damages at law whereas its district court complaint requests different, equitable relief. Pet. App. 11a-12a. The court rejected the suggestion that Section 1500 applies because the Nation sought an accounting in both courts, noting that the prayer for relief in the CFC does not request an accounting and that any "accounting in aid of judgment" that the CFC might direct after the Nation had established liability was entirely different than the equitable pre-liability accounting the Nation sought in the district court. *Id.* at 15a.

The government now asks this Court to resolve the question left open in *Keene*. The government urges a sweeping construction of Section 1500 that would foreclose CFC jurisdiction whenever a suit "associated in any way" with the CFC claim is pending in another court, regardless of the relief sought. *Id.* at 23. According to the government, the statute "forces [a plaintiff to make] a choice between suits seeking different relief." *Id.* But Congress has not required plaintiffs to forego a complete remedy and elect between suits seeking different relief against the government. On the contrary, Congress has endorsed the use of parallel suits to obtain both

money damages and equitable relief against the government.

As noted above, Section 1500 has long been held not to bar an action in the (now) CFC that seeks different relief than the earlier-filed action. The seminal decision is *Casman*, in which a government employee sued in district court for reinstatement to his position and then filed suit in the Court of Claims for back pay. At the time, a claim for back pay fell exclusively within the jurisdiction of the Court of Claims, but that court could not restore the plaintiff to his position. 135 Ct. Cl. at 649-50. The court denied the government's motion to dismiss under Section 1500 because, although the two suits involved the same wrongful conduct, they sought different relief. *Id.* at 650. This construction of the statute subsequently was applied in a number of other cases. *See, e.g., Allied Materials & Equip. Co., Inc. v. United States*, 210 Ct. Cl. 714 (1976); *River Home & Agricultural Coop. v. United States*, 215 Ct. Cl. 959 (1977); *Deltona Corp. v. United States*, 222 Ct. Cl. 659 n.1 (1980). In 1980, the Court of Claims said that "[i]t is settled law that § 1500 does not bar a proceeding in this court, asking monetary relief, if the other pending suit seeks only affirmative relief such as an injunction or a declaratory judgment." *Truckee-Carson Irrigation Dist. v. United States*, 223 Ct. Cl. 684 (1980).

Meanwhile, Congress amended the Tucker Act in 1972 to empower the Court of Claims, as an adjunct

to an award of money damages, to issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and the correction of applicable records. Pub. L. No. 92-415, 86 Stat. 652 (1972). The purpose of the amendment was to allow persons in cases like *Casman* "to obtain all necessary relief in one action." S. Rep. 92-1066, at 1, *reprinted in* 1972 U.S.C.C.A.N. 3116. Congress noted that previously it had been necessary for a wrongfully discharged federal employee "to file an additional suit in a Federal District court to obtain reinstatement." S. Rep. 92-1066, at 2, *reprinted in* 1972 U.S.C.C.A.N. at 3118.

Subsequently, in 1982, Congress enacted the Federal Courts Improvement Act, Pub. L. No. 97-164, 96 Stat. 25, "an omnibus law effecting significant changes in the administration of the federal courts, including the abolition of the old Court of Claims and Court of Customs and Patent Appeals and the creation of the new United States Claims Court and the United States Court of Appeals for the Federal Circuit." *Kaiser Alum. & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 862 (1990) (White, J., dissenting). Congress conferred on the Claims Court (now the CFC) the trial jurisdiction formerly exercised by the Court of Claims, including the Tucker Act and the Indian Tucker Act. And it amended Section 1500 to apply to the Claims Court, without making any other changes that would alter the established construction of the statute. Pub. L. No. 97-164, § 133, 96 Stat. 25, 39-41 (1981). Under

the reasoning of *Keene*, it must be presumed that Congress, in so doing, adopted the settled judicial construction that Section 1500 does not bar an action for damages in the Claims Court if the other pending suit seeks different substantive relief.

Congress's endorsement of the judicial construction of Section 1500 is confirmed by the legislative history of the 1982 Act. The Senate proposed to authorize the Claims Court to grant declaratory judgments and equitable relief in all controversies under the Tucker Act.[5] It explained that "this provision will avoid the costly duplication in litigation presently required when a citizen seeks both damages and equitable relief against the government." S. Rep. 97-275, at 19 (1981), *reprinted in* 1982 U.S.C.C.A.N. 11, 32 (emphasis added); *see also* 127 Cong. Rec. S14692-S14694 (daily ed. Dec. 8, 1981) (remarks of Sen. Dole, the bill manager).

The counterpart House bill originally contained an identical provision empowering the Claims Court to grant declaratory judgments and equitable relief. But this provision was dropped after the Justice Department objected that it would "vastly broaden

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[5] S. 1700 would have amended 28 U.S.C. § 1491(a)(2) so that it began "To afford complete relief in controversies within its jurisdiction, the court may grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief ...." 127 Cong. Rec. S11072 (Oct. 5, 1981).

the equitable power of the Article I Claims Court judges" and urged that the Claims Court should remain a special tribunal where only monetary claims against the United States are resolved. *Court of Appeals for the Federal Circuit – 1981*, Hearings on H.R. 2405 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 212 (1981) (Letter from Acting Assistant Attorney General Michael W. Dolan to Committee Chairman Peter W. Rodino, Jr.); *see also United States v. John C. Grimberg Co., Inc.*, 702 F.2d 1362, 1369-70 (Fed. Cir. 1983) (recounting the legislative history).

The final legislation did not confer on the Claims Court the broad grant of declaratory and equitable power proposed by the Senate. Rather, Congress adopted a different, much narrower provision empowering the Claims Court to grant declaratory judgments and equitable relief only in bid protests. *See* Pub. L. No. 97-164, § 133(a), 96 Stat. 25, 40 (1981). The result was that Congress left standing almost all of the existing limitations on declaratory and equitable relief under the Tucker Act, and the consequent need for plaintiffs to pursue a separate action in the district court in order to obtain declaratory or equitable relief against the government.

There is thus no question that Congress was fully aware at the time it created the Claims Court that certain plaintiffs would need to pursue separate

suits in the Claims Court and in district court to obtain complete relief. Significantly, Congress did not intimate that Section 1500 prohibits a litigant from bringing parallel suits in order to obtain both damages and equitable relief against the government. To the contrary, Congress considered expanding the remedial power of the Claims Court in order to eliminate the need for such duplication. Congress never intended to require a plaintiff to elect only one remedy, and the legislative history of the 1982 Act makes clear that Congress implicitly adopted the Court of Claims' long-standing interpretation of Section 1500 as barring only claims that seek the same relief.

II. A SUIT FOR AN ACCOUNTING IN DISTRICT COURT SEEKS DIFFERENT RELIEF THAN A DAMAGES SUIT IN THE CFC

Contrary to the government's argument, Pet. Br. at 47-48, a suit for a trust accounting in the district court does not seek the same relief as a damages action in the CFC.

A. Tribes Seek An Accounting To Obtain Essential Information About Their Trust Property

The purpose of a trust accounting is to provide the beneficiary "a detailed account of [the trust] receipts, disbursements, and property on hand, from

which the beneficiary can learn whether the trustee has performed his trust and what the current status of the trust is." G. Bogert *et al.*, *The Law of Trusts and Trustees* § 963 (2d ed. 1983). An accounting is not a remedy for trust mismanagement. Rather, a beneficiary is entitled to a full accounting, irrespective of whether any breach of trust has been alleged or proven. *See Restatement (Third) of Trusts* § 83 (2007) ("A trustee has a duty to maintain clear, complete, and accurate books and records regarding the trust property and the administration of the trust, and, at reasonable intervals on request, to provide beneficiaries with reports or accountings"). Thus, "[t]he most fundamental fiduciary responsibility of the government, and the Bureau [of Indian Affairs], is the duty to make a full accounting of the property and funds held in trust for the ... beneficiaries of Indian trust funds." "Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund," H.R. Rep. No. 102-499 at 5 (1992).

In the mid-1980's a government proposal to contract with a private bank to manage tribal trust funds brought to a head tribal concerns about trust asset management. At this time, most tribes were uninformed about the management of their trust funds and assets. They did not receive statements, listings of assets, or audits. Tribes often didn't know

the full extent of the land they owned,[6] what tribal property was leased and what wasn't, what the terms of the leases were, and whether or not the rents or royalties were being collected. This information is vital to their economic well-being and future development. Tribal leaders had significant concern that some of this information might be lost in transferring management responsibility to private hands.

Congress enacted a series of statutes requiring the government to provide accountings of Indian trust assets to the beneficiaries. In 1987 Congress required that Indian trust accounts be audited and reconciled. *See* Pub. L. No. 100-202, 101 Stat. 1329 (1987). In 1989 Congress added a requirement that the accounts be reconciled to the earliest possible date. *See* Pub. L. No. 101-121, 103 Stat. 701 (1989). The American Indian Trust Fund Management Reform Act of 1994 required that tribes be provided with reconciled account statements as of September 30, 1995, 25 U.S.C. § 4044, and with quarterly statements of performance on an ongoing basis. 25 U.S.C. § 4011. The 1994 Act "recognized and reaffirmed ... that the government has longstanding and substantial trust obligations to Indians ... not

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[6] On large reservations, it is common for tribes to own hundreds or thousands of separate tracts of land and undivided interests within those tracts.

the least of which is a duty to account." *Cobell v. Norton,* 240 F.3d 1081, 1098 (D.C. Cir. 2001).

In 1991 the accounting firm of Arthur Andersen & Co. was engaged by the Bureau of Indian Affairs ("BIA") to perform a reconciliation of Indian trust fund accounts. The scope of the project subsequently was narrowed to a set of agreed procedures on tribal accounts for the 20-year time period of Fiscal Years 1973-1992. Andersen concluded its work in the fall of 1995. The BIA prepared its own reconciled account statements for tribal trust funds for Fiscal Years 1993-1995. In 1996, the BIA provided "reconciliation reports" to the tribes, which included the Andersen work product for 1973-1992 and the BIA work product for 1993-1995.

But these reconciliation reports were deeply flawed. For example, the BIA could not certify that the reconciliations were performed in compliance with the agreed upon procedures. Tribal accounts could not be fully reconciled or audited due to missing records and the lack of an audit trail in the BIA's systems. Some 32,901 noninvestment transactions with a total value of $2.4 billion could not be reconciled. Further, all tribal leases with collections greater than $5,000 – some 6,446 leases -- and a sample of 100 leases of less than $5,000 were to be reviewed. But, due to time constraints, 1,399 leases with collections greater than $25,000 were identified for testing, of which 755 lease files were located and only 692 leases were actually tested.

Because the BIA did not know the universe of tribal leases, it could not determine total lease revenue expected to be collected during a given period to establish a benchmark for testing. Oil and gas royalties on Indian leases were to be traced from collection by the Minerals Management Service ("MMS") to the general ledger maintained by the BIA. But because MMS retained records for only six years, records for most of the 20-year reconciliation period were not available and alternative procedures at MMS were not performed due to time constraints. And the BIA did not disclose to the tribes which procedures specified in the reconciliation contract had not been performed or could not be completed and the reasons why not. *See* U.S. General Accounting Office, *Financial Management: BIA's Tribal Trust Fund Account Reconciliation Results*, GAO/AIMD-96-63 at 1-2, 4-7, 12, and 20-22 (May 3, 1996).

Agricultural leases are the primary source of income for CRIT, and the reconciliation report provided to CRIT analyzed 68 agricultural leases of reservation land. But during the relevant time period, there had been a total of some 1,858 agricultural leases plus a number of residential and commercial leases. An "under-collection" rate was reported for those 68 agricultural leases, *i.e.* the shortfall between rents that should have been collected and those that were actually collected. There was no means, however, for applying this data to all of the agricultural leases, much less for the

residential and commercial leases, nor was any list or summary of all such leases provided.

A judicially-ordered trust accounting would provide CRIT – and other tribes – with precisely this kind of vital information. *See Restatement (Second) of Trusts*, § 199 (1959) (the beneficiary can maintain a suit "to compel the trustee to perform his duties as trustee"). Such an accounting may reveal or bolster damages claims for breach of trust, but it has independent utility even if it does not do so. An accounting could reveal potential claims against third parties (such as lessees or other parties who have breached agreements regarding the use of tribal land or assets). Or it could provide information that is essential to strengthen the ongoing management of the tribe's trust assets. Tribes want to control the fate of their property. While they are not free to replace the trustee, they could withdraw and assume management of some or all of their trust funds. *See* 25 U.S.C. § 4022. And they can lobby the Executive Branch and Congress to make any changes in the government's management of the trust that an accounting shows are desirable. At a minimum, an accounting would confirm or dispel suspicions that tribal trust assets have been (and may continue to be) mismanaged and depleted.

In short, an accounting would provide the tribe with essential knowledge about the condition of the trust to which it is entitled. This explains why CRIT

and other tribes have brought suits for a trust accounting, separate and apart from any damages claim based on alleged mismanagement of their trust assets.

B. The CFC Cannot Order A Trust Accounting

Tribes cannot obtain a trust accounting in the CFC. Except for bid protests, *see* 28 U.S.C. § 1491(b)(2), the CFC has no power to grant affirmative non-monetary relief unless it is tied and subordinate to a money judgment. *See James v. Caldera,* 159 F.3d 573, 580 (Fed. Cir. 1998). Even then, such relief is limited to orders directing restoration to office or position, placement in appropriate duty or retirement status, or correction of applicable records. 28 U.S.C. § 1491(a)(2).[7] Nor can the CFC enforce a tribe's statutory and common law right to an accounting pursuant to the APA, *See Lion Raisins, Inc. v. United States,* 416 F.3d 1356, 1370 n. 11 (Fed.Cir.2005) (CFC lacks APA

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[7] The Federal Circuit recently stated in dictum that the CFC "appears to have the authority to order an equitable accounting as ancillary relief, the Tucker Act having been amended in 1982 'to permit the Court of Federal Claims to grant equitable relief ancillary to claims for monetary relief over which it has jurisdiction....'" *Eastern Shawnee Tribe of Oklahoma v. United States,* 582 F.3d 1306, 1308 (Fed. Cir. 2009). This is simply not so. As enacted, the 1982 legislation provided for grants of equitable relief only with respect to bid protests.

jurisdiction); *Martinez v. United States*, 333 F.3d 1295, 1313 (Fed.Cir.2003) (same). Thus, the CFC acknowledged below that it "cannot simply order an accounting as stand-alone relief." Pet. App. 40a.

While, in certain circumstances, the CFC may direct an accounting in aid of judgment, that is not a form of relief at all; rather, it is a litigation tool sometimes used to calculate the quantum of damages after liability has been proven. It is confined to determining damages for specific breach(es) of trust and does not extend to all of the property held in trust. Further, its temporal scope is limited by the applicable statute of limitations, as opposed to an accounting to the earliest possible date as directed by Congress.

Moreover, in order to obtain any accounting in the CFC, a tribe first has to prove that a breach of trust occurred. As the CFC noted in this case, if "plaintiff satisfied its burdens of proof, what would ensue would amount to an accounting, albeit in aid of judgment." Pet. App. 41a. This sort of accounting is the antithesis of the trust accounting that Congress mandated. Congress envisioned a trust accounting as a precursor to a possible breach of trust claim, not as part of the relief that flows from a successful breach of trust action. Thus, when it enacted the various trust accounting provisions, Congress also provided that the statute of limitations shall not commence to run on Indian breach of trust claims until an accounting is

furnished from which the beneficiary can determine whether there has been a loss. *See Shoshone Indian Tribe v. United States*, 364 F. 3d 1339, 1344-51 (Fed. Cir. 2004).[8]

From a practical perspective, an accounting in aid of judgment is no substitute for a trust accounting. Proving a breach of trust claim may well require a tribe to establish the trust's receipts, disbursements, and/or property on hand – in which event an accounting in aid of judgment would be superfluous. Conversely, because of the difficulties and expense involved in proving a breach of trust, a tribe may limit its claims to those that are easiest to prove or involve the most money – in which event a full accounting that might expose other breaches will never occur.

C. Tribal Suits For A Trust Accounting Do Not Trigger Section 1500

As 2002 approached, Indian tribes were concerned that the government would assert that the

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[8] *See also, e.g.*, Act of November 5, 1990, Pub. L. No. 101-512, 104 Stat. 1915; Act of November 13, 1991, Pub. L. No. 102-154, 105 Stat. 990; Act of October 5, 1992, Pub. L. No. 102-381, 106 Stat. 1374; Act of November 11, 1993, Pub. L. No. 103-138, 107 Stat. 1379; Act of September 30, 1994, Pub. L. No. 103-332, 108 Stat. 2499; Act of April 26, 1996, Pub. L. No. 104-134, 110 Stat. 1321.

flawed 1996 reconciliation reports had fulfilled its accounting obligation and triggered the six-year limitations period on breach of trust claims and claims under the APA. *See* 28 U.S.C. §§ 2501, 2401(a). To postpone the filing of needless claims and to encourage settlement negotiations, Congress provided that all of the reconciliation reports were deemed to have been received by tribes on December 31, 1999. *See* An Act to Encourage the Negotiated Settlement of Tribal Claims, Pub. L. No. 107-153, § 1, 116 Stat. 79 (2002) (codified at 25 U.S.C. § 4044 note). This effectively extended the limitations period by three years. At the end of this period, Congress again extended it by another year, thereby making the deadline for filing suit the end of 2006. Pub. L. No. 109-158, § 1, 119 Stat. 2954 (2005). With no further extensions in the offing, a number of tribes filed parallel suits in the district court and the CFC in late 2006. Pet. App. 94a-99a. This was a protective measure in a situation where the tribes were being forced to assert (and thereby preserve) their distinct claims for (1) mismanagement of trust assets and (2) the full accounting to which they are entitled.

In sum, a tribal suit for a trust accounting seeks different relief than a damages action in the CFC for breach of trust and so does not trigger Section 1500. A suit for an accounting seeks information about the identity, condition and use of the trust assets while an action for breach of trust seeks compensation for past mismanagement of trust assets.

The remaining question is whether Section 1500 is implicated where, as here, a tribe requests equitable monetary relief in connection with an accounting. Respondent's brief addresses this issue thoroughly and persuasively, and demonstrates that the equitable relief sought by the Nation in connection with the accounting is not the same as the damages the Nation seeks in the CFC. Amici adopt Respondent's analysis.

III. A SUIT FOR AN ACCOUNTING IS NOT BASED ON THE SAME OPERATIVE FACTS AS A DAMAGES SUIT FOR BREACH OF TRUST

Not only does a suit for a trust accounting seek different relief than a damages action for breach of trust, but it is based on different operative facts as well. This underscores the conclusion that – and furnishes an additional reason why – Section 1500 is inapplicable here.[9]

"[O]perative facts are those facts essential to the grievance for which recovery is sought." *Allstate Financial Corp. v. United States*, 29 Fed. Cl. 366, 369 (1993). A fact must be "relevant to a judicially

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[9] Because the Federal Circuit majority concluded that the "same relief" requirement is not met in this case, it did not consider whether the Nation's complaints arise from the same operative facts. Pet. App. at 9a n.1.

imposed remedy" in order to be "operative." *Loveladies*, 27 F.3d at 1551 n.17.

A tribal claim for a trust accounting is based on two operative facts: (i) the government holds property in trust for the tribe and (ii) the government has not provided the tribe with an accounting. In contrast, a tribal claim for breach of trust is based on allegations that (i) the government has mismanaged tribal trust assets and (ii) the tribe has suffered damages as a result. These are completely distinct sets of operative facts. The facts which support an accounting would not support a claim for breach of trust, and vice versa.

Nor is there a necessary relationship between these sets of operative facts. Although evidence of mismanagement may result from an accounting, the government's failure to provide an accounting does not establish that it has mismanaged trust assets. Likewise, a tribe's claim for breach of trust is not dependent on its having received an accounting from the government.

In this case, the Nation's complaint for an accounting also included allegations that the government had mismanaged some of its trust assets. But these were not operative facts in the district court action; rather, they were mere background information. "Surplusage [in a complaint] can and should be ignored." *United States ex rel. Garst v. Lockheed-Martin Corp.*, 328 F.3d 374, 378 (7th Cir. 2003). The operative facts in

a claim for a trust accounting remain the same regardless of what additional, non-operative facts may also be alleged.

Because a tribal claim for a trust accounting is based on different operative facts than a claim for money damages for breach of trust, it does not trigger Section 1500 and preclude a damages action in the CFC.

CONCLUSION

Congress implicitly approved of the use of separate suits to obtain damages and equitable relief against the government when it created the Claims Court (now the CFC) in 1982 and revised Section 1500 to apply to the new court. Because a tribal claim for a trust accounting in district court seeks different relief – and is based on different operative facts -- than a damages action for breach of trust in the CFC, it does not trigger Section 1500. Accordingly, the decision of the Federal Circuit should be affirmed.

Respectfully submitted,

STEVEN D. GORDON
Counsel of Record
STEPHEN J. MCHUGH
HOLLAND & KNIGHT LLP
2099 Pennsylvania Avenue, NW
Washington, D.C. 20006
202-955 3000
steven.gordon@hklaw.com

Counsel for Amici Curiae

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UNITED STATES OF AMERICA,

Petitioner,

v.

TOHONO O'ODHAM NATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

MARY DiCRESCENZO
THOMAS J. WARD
CHRISTOPHER M. WHITCOMB
NATIONAL ASSOCIATION OF HOME BUILDERS
1201 15th Street NW
Washington, D.C. 20005
(202) 266-8146

ROBERT H. THOMAS
Counsel of Record
MARK M. MURAKAMI
REBECCA A. COPELAND
CHRISTOPHER PAN
DAMON KEY LEONG KUPCHAK HASTERT
1003 Bishop Street
1600 Pauahi Tower
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether 28 U.S.C. § 1500 strips the Court of Federal Claims of jurisdiction over a claim against the United States for money damages if the plaintiff has pending in district court a suit against the United States seeking different relief.

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	7
I. PROPERTY OWNERS SEEKING COMPLETE RELIEF FROM A FEDERAL ACT INTERFERING WITH PROPERTY MUST SPLIT THEIR CLAIMS BETWEEN THE CFC AND THE DISTRICT COURTS	7
A. Due Process First, Takings Second	7
B. Federal Jurisdictional Split: District Court First, CFC Second	12
II. TWO EXAMPLES HIGHLIGHT THE ABSURD AND INEQUITABLE NATURE OF THE GOVERNMENT'S INTERPRETATION OF SECTION 1500	21
CONCLUSION	24

TABLE OF AUTHORITIES

Page

CASES

1902 Atlantic Ltd. v. Hudson, 574 F. Supp. 1381 (D.C. Va. 1983) 13

Agins v. City of Tiburon, 447 U.S. 255 (1980) 2, 8

Alameda Gateway, Ltd. v. United States, 45 Fed. Cl. 757 (1999) 23

Babbitt v. Youpee, 519 U.S. 234 (1997) 2, 12

Bell Atl. Tel. Cos. v. F.C.C., 24 F.3d 1441 (C.A. D.C. 1994) 13

Casman v. United States, 135 Ct. Cl. 647 (1956) 5, 18, 20

Clark v. Martinez, 543 U.S. 371 (2005) 20

Cooke v. United States, 77 Fed. Cl. 173 (Fed. Cl. 2007) 15

Cristina Inv. Corp. v. United States, 40 Fed. Cl. 571 (1998) 13, 16

Del-Rio Drilling Programs, Inc. v. United States, 146 F.3d 1358 (Fed. Cir. 1998) 16

Dolan v. City of Tigard, 512 U.S. 374 (1994) 2, 12, 18

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) 11, 13

Edmond v. United States, 520 U.S. 651 (1997) 19

Fallini v. Hodel, 725 F. Supp. 1113 (D. Nev. 1989) 13

First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Florida Rock Industries, Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986) 12, 16

Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) 9

Hodel v. Irving, 481 U.S. 704 (1987) 10

Holland v. Florida, 130 S. Ct. 2549 (2010) 18

Hooper v. California, 155 U.S. 648 (1895) 19

Jacobs v. United States, 290 U.S. 13 (1933) 17

John R. Sand and Gravel Co. v. United States, 552 U.S. 130 (2008) 3, 16

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 11

Keene Corp. v. United States, 508 U.S. 200 (1993) 2, 22

Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005) ..... *passim*

Loveladies Harbor, Inc. v. United States, 27 F.3d 1545 (Fed. Cir. 1994) 5, 14, 20, 21, 22

Marks v. United States, 34 Fed. Cl. 387 (Fed. Cl. 1995) 15

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 9

N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 19

NAHB v. Defenders of Wildlife, 551 U.S. 644 (2007) 2, 3

TABLE OF AUTHORITIES – Continued

Page

Nectow v. City of Cambridge, 277 U.S. 183 (1928) 9

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 2, 12

OSI, Inc. v. United States, 73 Fed. Cl. 39 (2006) 14

Penn Central Trans. Co. v. New York City, 438 U.S. 104 (1978) 8, 9

Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922) 9

Perry v. Sindermann, 408 U.S. 593 (1972) 18

Pickering v. Bd. of Ed. of Township High Sch. Dist., 391 U.S. 563 (1968) 18

Presault v. I.C.C., 494 U.S. 1 (1990) 17

Richardson v. Morris, 409 U.S. 464 (1973) 13

San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981) 2, 17

Security Sav. Bank, SLA v. Dir., Office of Thrift Supervision, 798 F. Supp. 1067 (D. N.J. 1992) 13

Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Prot., 130 S. Ct. 2592 (2010) 10

United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366 (1909) 19

United States v. Alameda Gateway, Ltd., 213 F.3d 1161 (9th Cir. 2000) 22

TABLE OF AUTHORITIES -- Continued

Page

United States v. Clarke, 445 U.S. 253 (1980) 17

United States v. Int'l Business Machines Corp., 517 U.S. 843 (1996) 19

Williams v. United States, 71 Fed. Cl. 194 (Fed. Cl. 2006) 15

Williamson County Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 2, 9

STATUTES

28 U.S.C. § 1491 (2006) 4

28 U.S.C. § 1500 (2006) .....*passim*

28 U.S.C. § 1505 (2006) 4

28 U.S.C. § 2501 (1994) 16

INTEREST OF AMICUS CURIAE

National Association of Home Builders (NAHB) is a Washington, D.C.-based trade association whose mission is to enhance the climate for housing and the shelter industry.[1] As the voice of America's housing industry, NAHB helps promote policies that will keep housing a national priority. Founded in 1942, NAHB is a federation of more than 800 state and local associations. About one-third of NAHB's 175,000 members are home builders and/or remodelers, and its members construct about 80 percent of the new homes built each year in the United States.

The organizational policies of NAHB have long advocated that a property owner must be compensated when government acquires his or her land or reduces its value by regulation. NAHB's members frequently face state action that eliminates the economically viable use of their property, and NAHB supports the application of the Fifth Amendment's Takings Clause to legislative, executive, and judicial action.

NAHB is a vigilant advocate in federal and state courts, and it frequently participates as a party litigant and amicus curiae to safeguard the property

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[1] All counsel of record consented to the filing of this brief, and received notice of the intention to file this brief at least ten days before it was due. This brief was not authored in any part by counsel for either party, and no person or entity other than amicus made a monetary contribution toward the preparation or submission of this brief.

rights and interests of its members. For example, NAHB was a petitioner in *NAHB v. Defenders of Wildlife*, 551 U.S. 644 (2007), and also participated in many other cases before this Court as amicus curiae or of counsel. A large number of those cases involved landowners and other parties aggrieved by overzealous regulation under a wide array of statutes and regulatory programs.[2]

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[2] Cases in which NAHB has appeared as an amicus curiae or of counsel before this Court include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas and Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Keene Corp. v. United States*, 508 U.S. 200 (1993); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Ore.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Franconia Assocs. v. United States*, 536 U.S. 129 (2002); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Kelo v. City of New London*, 545 U.S. 469 (2005); *S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370 (2006); *Rapanos v.*

(Continued on following page)

NAHB is participating in this case in support of the Respondent Tohono O'odham Nation (Nation) to elucidate the consequences of the Government's position in this case on regulatory takings cases. For that reason, NAHB participated as an amicus in *Keene Corp. v. United States*, 508 U.S. 200 (1993), the previous case in which this Court considered the scope of section 1500, and *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545 (Fed. Cir. 1994) (en banc), the case in which the Federal Circuit applied *Keene Corp.* and which provided the rule of decision for the panel decision now under review. This case is of the upmost interest to NAHB and its members because a ruling in favor of the Government will, for some property owners, close the door to the United States Court of Federal Claims (CFC), the *only* available forum in which they may recover money damages from the federal government. Adopting the Government's interpretation of section 1500 will thus prevent some regulatory takings plaintiffs from obtaining the just compensation to which they are entitled.

United States, 547 U.S. 715 (2006); *NAHB v. Defenders of Wildlife*, 551 U.S. 644 (2007); *John R. Sand and Gravel Co. v. United States*, 552 U.S. 130 (2008); *Winter v. Natural Res. Def. Council*, 129 S. Ct. 365 (2008); *Coeur Alaska, Inc. v. Southeast Alaska Cons. Council*, 129 S. Ct. 2458 (2009); *Summers v. Earth Island Inst.*, 129 S. Ct. 1142 (2009); *Entergy Corp. v. Envtl. Protection Agency*, 129 S. Ct. 1498 (2009).

SUMMARY OF ARGUMENT

In the Government's view, Congress' broad waiver of sovereign immunity in the Tucker Act comes with a high price tag: In order to pursue money damages against the Government in the CFC, claimants must effectively forfeit their rights to seek all other forms of relief that could be "associated" with that claim, including declaratory, injunctive, and other equitable relief.

That is the sweeping reading of the phrase "any claim for or in respect to" in 28 U.S.C. § 1500 (2006) that the Government urges this Court to adopt when it argues that the Nation's CFC suit seeking money damages must be dismissed merely because it stems from the same trust relationship between the Nation and the Government as the Nation's district court suit seeking an equitable accounting. The statute, however, is most naturally read to bar CFC jurisdiction only when the "operative facts" are the same in both actions and both actions seek the same relief. That construction is *in pari materia* with the larger statutory scheme of expansive waivers of sovereign immunity of which section 1500 is a part, including the Tucker Act, 28 U.S.C. § 1491 (2006), and the Indian Tucker Act, 28 U.S.C. § 1505 (2006). Congress did not provide a means for wronged parties to seek redress in the form of damages only to condition it on the surrender of other causes of action. The Government's reading of section 1500 is grossly overbroad, and this Court should reject it.

The panel below and the en banc Federal Circuit in *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1549-51 (Fed. Cir. 1994) (en banc) relied upon more than half a century of Court of Claims reasoning when they concluded that section 1500 deprives the CFC of subject matter jurisdiction only when an earlier-filed district court action seeks duplicative relief. *See Casman v. United States*, 135 Ct. Cl. 647, 647 (1956). As respondent explains, "claim" in section 1500 means "claim for relief," and the statute was designed to have plaintiffs elect a single forum in which to press claims for damages. It was not meant to deprive them of the only forum in which they may seek such damages simply because they may also wish to assert other claims. Indeed, Congress has required plaintiffs to split between the CFC and the district courts claims for relief which – but for the allocation of jurisdiction between the district courts and the CFC – otherwise could be considered in a single action. Nothing in the statutory scheme suggests that Congress thereby intended to deprive plaintiffs of one form of relief if they elect to seek another.

The Government's reading of section 1500 traps plaintiffs in many contexts in a jurisdictional "gotcha." This brief focuses on one of those contexts, regulatory takings, to illustrate that the Government's interpretation of section 1500 *cannot* be correct. The Government's reading of the statute would force private property owners into a quandary: either they must forfeit their ability to challenge the validity

of the regulation, or they must risk losing their rights to seek just compensation. Such a construction of the statute, in addition to being inequitable, raises serious constitutional concerns.

Like the Nation's claims for relief in the case at bar, a claim that an action of the Government unconstitutionally impacts property must be split between the district courts, which have exclusive jurisdiction to entertain claims that the regulations fail to "substantially advance a legitimate state interest" or is otherwise invalid under the Due Process Clause, and the CFC, which has exclusive jurisdiction to award just compensation (but only after the district court has ruled the regulation valid or the plaintiff has conceded its validity). Under the Government's theory, separate claims for relief brought in the district court and CFC are, to use the Government's phrase "associated," and the CFC action for just compensation is subject to dismissal. Thus, under the Government's view of section 1500, a property owner would be forced either to forfeit the right to challenge the regulation, or risk losing her right to seek just compensation.

This brief is focused on two points. *First*, a property owner's assertion that the Government has violated the Due Process and Takings Clauses of the Fifth Amendment *must* be split between the district courts and the CFC, respectively, and the CFC action can *only* be filed after the district court action. The Government's interpretation of section 1500 cannot be correct, since the statute should not be read to

deprive property owners of the right to seek just compensation. *Second*, this brief will highlight two examples from regulatory takings cases to show how the Government's reading of section 1500 would lead to absurd and unfair results.

ARGUMENT

Originally enacted in 1868 to thwart forum shopping and duplicative lawsuits by claimants seeking compensation for cotton seized during the Civil War, section 1500 deprives the CFC of subject matter jurisdiction over "any *claim* for or in respect to which the plaintiff . . . has pending in any other court any suit or process against the United States." 28 U.S.C. § 1500 (2006) (emphasis added). This statutory withdrawal of CFC subject matter jurisdiction should be viewed in the same way that the CFC and its predecessor courts have viewed it for more than fifty years: to bar CFC consideration only when the relief sought in the two actions is the same.

I. PROPERTY OWNERS SEEKING COMPLETE RELIEF FROM A FEDERAL ACT INTERFERING WITH PROPERTY MUST SPLIT THEIR CLAIMS BETWEEN THE CFC AND THE DISTRICT COURTS

A. Due Process First, Takings Second

The Due Process and Takings Clauses of the Fifth Amendment protect property owners from

deprivations of their property either by governmental action that does not "substantially advance a legitimate state interest," *see Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 542 (2005) (due process test), or that is the functional equivalent of an exercise of eminent domain. *See Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 124-26 (1978) (takings test). "Regulatory takings" doctrine recognizes that government's power to adopt and impose regulations affecting private property operates on a continuum, and when it crosses a line – goes "too far" – it matters not what label the government has attached to the exercise of power, what matters is the impact of the action on the fundamental right of property. *See First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 316 (1987) ("While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings.").

Prior to *Lingle*, a challenge to the validity of the government regulatory action was part of the "takings" canon. *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (a regulation is a taking if it does not substantially advance legitimate state interests). In *Lingle*, however, this Court rejected the *Agins* "substantially advances" formulation as a takings test, and clarified that the heightened scrutiny required is not a "takings" standard, but rather sounds in due process. *Lingle*, 544 U.S. at 540 ("We conclude that this

formula [the *Agins v. City of Tiburon* substantially advances' test] prescribes an inquiry in the nature of a due process, not a takings test[.])").[3] *See also id.* at 548 (Kennedy, J., concurring) ("This separate writing is to note that today's decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process."); *Williamson County Reg'l Plan. Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985) ("The remedy for a regulation that goes too far, under the due process theory, is not 'just compensation,' but invalidation of

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[3] Heightened scrutiny in this context has its source in *Penn Central Trans. Co. v. New York City*, 438 U.S. 104, 127 (1978). In that case, the Court held a regulation is not a taking when it serves "a substantial public purpose." *Id.* (citing *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962)). The Court held it is:

> implicit in *Goldblatt* that a use restriction on real property may constitute a "taking" if not reasonably necessary to the effectuation of a substantial public purpose . . . or perhaps if it has an unduly harsh impact upon the owner's use of the property.

Penn Central, 438 U.S. at 127 (emphasis added) (citing *Nectow v. City of Cambridge*, 277 U.S. 183 (1928)) and *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (Stevens, J., concurring)). Thus, courts may examine the means used to accomplish important government ends. This Court has continued to examine regulation under this standard for over three-quarters of a century. *First English*, 482 U.S. at 316 ("It has also been established doctrine at least since Justice Holmes' opinion for the Court in [*Mahon*] that '[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'") (quoting *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922).

the regulation[.]")." Despite the change in nomenclature in *Lingle*, however, the existing procedure has not changed; a property owner who does not concede the validity of a regulation, but challenges it (whether under the Due Process Clause or some other theory, such as invalidity under the Administrative Procedure Act (APA)) must assert that claim separately from any claim seeking compensation:

> [Questions regarding a] regulation's underlying validity . . . [are] logically *prior* to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property "for public use." It does not bar government from interfering with property rights, but rather requires compensation "in the event of otherwise proper interference amounting to a taking." Conversely, if a government action is found to be impermissible – for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due

[4] District Courts retain the power to declare certain regulatory actions violative of the Takings Clause: for example, if the legislature declares what was private property to be public property, but makes no allocation for compensation. *See, e.g., Hodel v. Irving*, 481 U.S. 704, 718 (1987) (invalidating federal statute as violating the Takings Clause); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Prot.*, 130 S. Ct. 2592, 2602 (2010) (plurality opinion) (state supreme court decision that transforms private property to public property violates Takings Clause).

> process – that is the end of the inquiry. No amount of compensation can authorize such action.

Lingle, 544 U.S. at 543 (emphasis added) (quoting *First English*, 482 U.S. at 315 (Fifth Amendment requires both invalidation and just compensation remedies for police power regulations that violate Takings Clause)); *see also Eastern Enterprises v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring) ("[T]he Takings Clause . . . has not been understood to be a substantive or absolute limit on the government's power to act. The Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge. The Clause presupposes what the government intends to do is otherwise constitutional."). In *Eastern Enterprises*, a plurality of this Court rejected the argument that a post-deprivation compensation remedy was the only available claim to a property owner. *Id.* at 522 ("Based on the nature of the taking alleged in this case, we conclude that the declaratory judgment and injunction sought by petitioner constitute an appropriate remedy under the circumstances, and that it is within the district courts' power to award such equitable relief."); *see also Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) ("Thus, if the Government wishes to make what was formerly Kuapa Pond into a public aquatic park after petitioners have proceeded as far as they have here, it may not, without invoking its eminent domain power and paying just compensation, require them to allow free access to the dredged

pond[.]"); *Babbitt v. Youpee*, 519 U.S. 234, 236-42 (1997) (affirming district court's invalidation of statute for violation of the Takings Clause because statute made no provision for the payment of compensation); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841-42 (1987) (court invalidating government action for violating the Takings Clause); *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994) (invalidation for violation of Takings Clause).

Under *Lingle* then, due process and takings claims are separate and distinct "claims" and the Constitution requires a forum for each.

B. Federal Jurisdictional Split: District Court First, CFC Second

When federal action is alleged to be invalid and to have violated the Takings Clause, the jurisdictional split between the district courts on one hand, and the CFC on the other, requires a property owner to litigate those claims in two fora. A regulatory takings plaintiff who wants to challenge the validity of government action, yet preserve her right to seek just compensation if the action is upheld, cannot do so in a single suit. To obtain declaratory, injunctive, or equitable relief under the APA or directly under the Due Process Clause, the property owner must file suit in district court.[6] To obtain just compensation, the

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[6] *See, e.g., Florida Rock Industries, Inc. v. United States*, 791 F.2d 893, 898 (Fed. Cir. 1986) (permit challenge properly

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owner must file a separate action in the CFC under the Tucker Act. *See Richardson v. Morris*, 409 U.S. 464, 465 (1973) (per curiam) (the Tucker Act "has long been construed as authorizing only actions for money judgments and not suits for equitable relief against the United States."); *accord Cristina Inv. Corp. v. United States*, 40 Fed. Cl. 571, 578 (1998); *see also Eastern Enter.*, 524 U.S. at 521-22 (recognizing dual fora of CFC and district court for different relief).

The property owner must also seek this relief in a set sequence: Only after the validity of the regulation is either adjudicated in favor of the Government, or conceded by the property owner, is a claim in the CFC under the Just Compensation Clause ripe. *Lingle*, 544 U.S. at 543; *Eastern Enterprises*, 524 U.S. at 521-22. In other words, the district court action must be filed *first*, and the CFC action *second*.

Thus, by properly ripening a claim for just compensation, the property owner would be walking

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brought under APA); *Bell Atl. Tel. Cos. v. F.C.C.*, 24 F.3d 1441, 1445-46 (C.A. D.C. 1994) (APA preserves ability to challenge government action in district court); *Security Sav. Bank, SLA v. Dir., Office of Thrift Supervision*, 798 F. Supp. 1067, 1077 (D. N.J. 1992) (Tucker Act does not forbid injunctive relief in APA); *Fallini v. Hodel*, 725 F. Supp. 1113, 1122 (D. Nev. 1989) (APA authorizes district courts to review constitutional claims including Fifth Amendment takings); *1902 Atlantic Ltd. v. Hudson*, 574 F. Supp. 1381, 1406 (D.C. Va. 1983) (In APA, Congress intended district courts to exercise authority to set aside governmental action contrary to constitutional right).

squarely into the jurisdictional ambush set by the Government's broad reading of section 1500. The district court action for administrative, injunctive or declaratory relief clearly could be deemed "associated" with the later-filed CFC action for just compensation, meaning that under the Government's theory, the CFC case should be dismissed.

The CFC has denied the Government's repeated attempts to invoke section 1500 to seek dismissal of a CFC suit seeking damages in takings and similar cases when the plaintiff had previously filed a district court action seeking different relief. In *OSI, Inc. v. United States*, 73 Fed. Cl. 39 (2006), a property owner first sought an injunction and reimbursement of contamination cleanup costs in the district court. *Id.* at 40. While the district court case was still pending, the property owner filed suit in the CFC claiming the Government's actions in depositing hazardous waste on and around its property was an uncompensated taking and seeking compensation. *Id.* Considering a motion to dismiss under section 1500, the CFC held that "[b]ecause Plaintiff seeks different monetary relief in the District Court action and the instant action . . . § 1500 does not divest this Court of jurisdiction over Plaintiff's contamination claim." *Id.* at 41. In other words, "Plaintiff does not and cannot seek under CERCLA the damages for the destruction and diminution in the value of its property claimed as compensation for the taking here." *Id.* at 46. The CFC, as it has repeatedly, denied the Government's motion to dismiss. *Id.*; *accord Loveladies*, 27 F.3d at

1548; *Cooke v. United States*, 77 Fed. Cl. 173, 178-79 (Fed. Cl. 2007) (denying the Government's motion to dismiss pursuant to § 1500 in the employment context because the requested monetary relief can be granted for each claim in a different form and measure, and thus there is no risk of subjecting the Government to double liability."); *Williams v. United States*, 71 Fed. Cl. 194, 200 (Fed. Cl. 2006) (denying the Government's motion to dismiss pursuant to § 1500 because "there is no explicit overlap in the requested relief. Williams seeks monetary relief and correction of his military records in this court. . . . [but] [i]n the district court, Williams sought only declaratory relief[.]"); *Marks v. United States*, 34 Fed. Cl. 387, 400 (Fed. Cl. 1995) (denying the Government's motion to dismiss in takings case because "the nature of the two claims, one, a request for compensation due to an alleged improper taking under Amendment V to the Constitution, in this court and the other, a request for declaratory and injunctive relief, in the district court. . . . are different, thus diminishing the effect of a section 1500 claim.").

A property owner might consider first fully resolving the district court litigation before instituting suit in the CFC, but this approach also has its perils, since Tucker Act claims in the CFC have a six-year statute of limitations, and the unripe CFC case may expire while the district court litigation runs its

course. *See* 28 U.S.C. § 2501 (1994).[6] Nor could a property owner avoid this conundrum by filing her claim for compensation in the CFC first, since as noted above, it would be subject to dismissal on ripeness grounds, unless she conceded the validity of the government action. *See Cristina Inv. Corp., v. United States*, 40 Fed. Cl. 571, 578 n.3 (1998) (a takings claimant "must concede the validity of the government action that is the subject of his claim . . . [because] the Fifth Amendment does not empower the court to award just compensation for unauthorized acts of government officials") (emphasis omitted) (citing *Fla. Rock Indus., Inc. v. United States*, 791 F.2d 893, 898 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987)); *accord Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1362 (Fed. Cir. 1998) ("A compensable taking arises only if the government action in question is authorized.").

The Government's interpretation of section 1500 cannot be correct, since it forces property owners to choose between two available remedies, invalidation or compensation. The right to just compensation, however, is self-executing, and flows directly from the Constitution. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987) ("We have recognized that a landowner is entitled to bring an action in inverse

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[6] Nor could the litigants agree to toll the statute of limitations. *John R. Sand and Gravel Co. v. United States*, 552 U.S. 130, 134-39 (2008).

condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation[.]' As noted in Justice Brennan's dissent in *San Diego Gas & Electric Co.*, 450 U.S. at 654-655, it has been established at least since *Jacobs v. United States*, 290 U.S. 13 (1933), that claims for just compensation are grounded in the Constitution itself") (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980)); *see also First English*, 482 U.S. at 316 n.9 ("[I]t is the Constitution that dictates the remedy for interference with property rights amounting to a taking").[7]

The Government's overly broad interpretation of section 1500 thus takes on a constitutional dimension since it would potentially deprive property owners of their ability to seek just compensation, or condition their ability to obtain it on their forfeiture of their rights to invalidate the offending regulation. In similar circumstances, this Court has held:

> Under the well settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a

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[7] Additionally, if the Tucker Act remedy in the CFC were not available, a wide range of Government regulations would be subject to invalidation as uncompensated takings by district courts because those claims would not be ripe. *See, e.g., Presault v. I.C.C.*, 494 U.S. 1, 11-12 (1990) (availability of Tucker Act to obtain just compensation made takings challenge not ripe in district court).

> public use – in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.

Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (citing *Perry v. Sindermann*, 408 U.S. 593 (1972); *Pickering v. Bd. of Ed. of Township High Sch. Dist.*, 391 U.S. 563, 568 (1968)). This concern is even more pronounced here, where property owners and claimants such as the Nation are not seeking discretionary government benefits, but to secure complete relief for alleged violations of their constitutional rights, a much more important interest.[8]

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[8] Time and again, this Court and federal and state courts nationwide have cautioned in a variety of contexts against interpreting case law and statutes in a way that would lead to the closing of courthouse doors. *See, e.g., Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010) ("The importance of the Great Writ, the only writ explicitly protected by [U.S. Const., Art. I, § 9, cl. 2], along with congressional efforts to harmonize the new statute with prior law, counsels hesitancy before interpreting AEDPA's statutory silence as indicating a congressional intent to close courthouse doors that a strong equitable claim would ordinarily keep open."); In enacting section 1500, Congress did not seek to limit justice but rather to require plaintiffs to elect a specific forum wherein money damages could be sought. *See Casman*, 135 Ct. Cl. at 647 (interpreting section 1500 as being inapplicable where the relief sought in district court is entirely different than the relief sought in the Court of Claims). To promote the underpinnings of our judicial system – the right to seek redress from wrongs – if any doubt remains regarding the meaning of section 1500, this Court should err on the side of keeping open the doors of justice, not slamming them shut.

It is a settled canon of statutory construction that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979); *accord Edmond v. United States*, 520 U.S. 651, 658 (1997) ("[P]etitioners are asking us to interpret Article 66(a) in a manner that would render it clearly unconstitutional – which we must of course avoid doing if there is another reasonable interpretation available."). As this Court has explained:

> In interpreting statutes, for example, we have long observed "[t]he elementary rule . . . that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."

United States v. Int'l Business Machines Corp., 517 U.S. 843, 868 (1996) (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)); *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.").

While regulatory takings cases may raise special constitutional concerns because of the constitutional nature of the just compensation remedy, those concerns should inform the interpretation of section 1500 regardless of the context in which the question arises

– since statutes must have a single consistent meaning. Moreover, any reading of the statute that deprives plaintiffs of the complete remedy to which Congress has otherwise entitled them raises significant questions. Accordingly, because the canon of constitutional avoidance counsels especially strongly against the Government's reading of section 1500 in takings context, it requires rejection of the Government's reading in any context. *See Clark v. Martinez*, 543 U.S. 371, 381-82 (2005).

In the case at bar, the Court is presented with two competing views of section 1500. The construction urged by the Nation has been utilized by the Federal Circuit and by the CFC and its predecessors for more than fifty years. *See Casman v. United States*, 135 Ct. Cl. 647, 647 (1956); *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545, 1551 (Fed. Cir. 1994) (en banc). During this time Congress has not overruled this construction but, indeed, as demonstrated in respondent's brief, has implicitly endorsed it. The expansive view pressed by the Government, on the other hand, not only flies in the face of the balance of the statutory scheme waiving the United States' sovereign immunity in a wide variety of contexts, but also cannot be squared with the doctrine of constitutional avoidance. Consequently, the long-standing construction of section 1500 by the Federal Circuit and the Court of Claims should be affirmed.

II. TWO EXAMPLES HIGHLIGHT THE ABSURD AND INEQUITABLE NATURE OF THE GOVERNMENT'S INTERPRETATION OF SECTION 1500

Two previous regulatory takings decisions illuminate the extreme overbreadth of the Government's proposed standard ("associated in any way") and the anomalous results that flow from it.

In *Loveladies Harbor, Inc. v. United States*, 27 F.3d 1545 (Fed. Cir. 1994) (en banc), the Federal Circuit Court confronted a very similar issue as the one now before this Court – but in the regulatory takings context. The property owner unsuccessfully sought a wetlands development permit from the Army Corps of Engineers. *Id.* at 1547. The property owner first filed suit in district court challenging the validity of the permit denial under the Administrative Procedures Act. *Id.* While the district court case was pending, the property owner instituted a CFC action seeking just compensation because the denial of its permit was a taking. The CFC agreed. *Id.* On appeal, the Government argued that the CFC lacked jurisdiction under section 1500 because the claims brought in the district court and CFC were "the same." *Id.* at 1549.

The Federal Circuit rejected this characterization. *Id.* "If the claims are distinctly different, Loveladies are excused from the jurisdictional dance required by § 1500." *Id.* "Deciding if the claims are the same or distinctly different requires a comparison

of the claims raised in the Court of Federal Claims and in the other lawsuit." *Id.* (citing *Keene*, 508 U.S. at 210 (internal quotation marks omitted)). While both the district court action and the CFC action were based on the Government's violation of the Fifth Amendment, the district court complaint sought declaratory relief but the CFC complaint sought money damages. *Loveladies*, 27 F.3d at 1553. The court concluded that for the CFC to be precluded under section 1500 from hearing a claim, "the claim pending in another court must arise from the same operative facts, and must seek the same relief." *Id.* at 1551. The court noted that "[w]e know of no case arising from the same operative facts in which § 1500 has been held to bar jurisdiction over a claim praying for relief distinctly different from that sought in a pending proceeding." *Id.*

In a situation involving navigable waters arising six years later, the CFC again rejected the Government's overbroad interpretation of section 1500. In *United States v. Alameda Gateway, Ltd.*, 213 F.3d 1161 (9th Cir. 2000), the Government sued a San Francisco Bay property owner who refused to remove its piers when they became "obstructions to navigation" under the Rivers and Harbors Act of 1899 after the Corps of Engineers redrew harbor lines in order to transform the formerly legal structures into illegal "obstructions" which must be removed at owner expense. *Id.* at 1163-64. When the property owner refused to comply, the Corps demolished the piers and filed suit for reimbursement. *Id.* The property owner

brought its mandatory counterclaim, asserting, under *Agins*, that the Corps' actions did not substantially advance a legitimate governmental interest and seeking invalidation. After an adverse ruling in the district court, the property owner instituted an action in the CFC seeking just compensation. *See Alameda Gateway, Ltd. v. United States*, 45 Fed. Cl. 757 (1999). The government invoked section 1500 asserting that the counterclaim precluded CFC jurisdiction. In an unreported order, the CFC rejected the Government's claim that section 1500 deprived it of jurisdiction. Eventually, the CFC held that the property owner was entitled to recover just compensation from the Government for a partial taking, even as the Ninth Circuit held that the property owner was liable to the Government for the cost of demolishing its own piers.[9]

In both of the above situations, the interpretation of section 1500 the Government urges this Court to adopt would have barred the property owners from obtaining just compensation, even though the property owners could obtain the alternative relief they sought only in the district court. Section 1500 was designed to prohibit forum shopping and to make claimants choose a single forum in which to seek money damages from the Government. It cannot be read to bar all other claims merely because they may be "associated in any way" with a claim for damages,

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[9] These cases settled after *Alameda Gateway* sought this Court's review of the Ninth Circuit's opinion.

and certainly cannot be read to force a claimant to choose a damage remedy at the expense of all others.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

ROBERT H. THOMAS
Counsel of Record
MARK M. MURAKAMI
REBECCA A. COPELAND
CHRISTOPHER PAN
DAMON KEY LEONG
KUPCHAK HASTERT
1003 Bishop Street
1600 Pauahi Tower
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

MARY DiCRESCENZO
THOMAS J. WARD
CHRISTOPHER M. WHITCOMB
NATIONAL ASSOCIATION OF
HOME BUILDERS
1201 15th Street NW
Washington, D.C. 20005
(202) 266-8146

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

TOHONO O'ODHAM NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR *AMICUS CURIAE* OSAGE NATION IN SUPPORT OF RESPONDENT

PATRICIA A. MILLETT
Counsel of Record
DONALD R. PONGRACE
JAMES P. TUITE
MERRILL C. GODFREY
JAMES T. MEGGESTO
AKIN GUMP STRAUSS
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000
pmillett@akingump.com

Attorneys for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1
SUMMARY OF ARGUMENT 1
I. SECTION 1500 DOES NOT PRECLUDE COURT OF FEDERAL CLAIMS JURISDICTION WHEN A SECOND SUIT SEEKS DISTINCT RELIEF FOR WHICH SOVEREIGN IMMUNITY HAS BEEN WAIVED 3
A. Section 1500 Must Be Construed Harmoniously With Other Waivers of Sovereign Immunity 3
B. This Court Lacks Jurisdiction To Address The *Tecon* Time-Of-Filing Rule 13
CONCLUSION 18

TABLE OF AUTHORITIES

Cases

American Book Co. v. Kansas ex rel. Nichols,
193 U.S. 49 (1904) 15

Bate Refrigerating Co. v. Sulzberger,
157 U.S. 1 (1895) 13

Bell v. Hood,
327 U.S. 678 (1946) 7

Black v. Cutter Labs.,
351 U.S. 292 (1956) 17

Bolling v. Sharpe,
347 U.S. 497 (1954) 7

Bowen v. Massachusetts,
487 U.S. 879 (1988) 5

BP America Prod. Co. v. Burton,
549 U.S. 84 (2006) 10

Califano v. Yamasaki,
442 U.S. 682 (1979) 7

California v. San Pablo & Tulare R. Co.,
149 U.S. 308 (1893) 15

Calmar S.S. Corp. v. United States,
345 U.S. 446 (1953) 4, 12

Capital Traction Co. v. Hof,
174 U.S. 1 (1899) 16

Casman v. United States,
135 Ct. Cl. 647 (1956) 12

Church of Scientology v. United States,
506 U.S. 9 (1992) 15
Davis v. Elmira Sav. Bank,
161 U.S. 275 (1896) 16
Digital Equip. Corp. v. Desktop Direct, Inc.,
511 U.S. 863 (1994) 4
Dole Food Co. v. Patrickson,
538 U.S. 468 (2003) 14
Ex parte Young,
209 U.S. 123 (1908) 7
FDA v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 10
Franklin Tel. Co. v. Harrison,
145 U.S. 459 (1892) 6
Grupo Dataflux v. Atlas Global Grp.,
541 U.S. 567 (2004) 13
Jacobs v. United States,
290 U.S. 13 (1933) 8
Johnson v. De Grandy,
512 U.S. 997 (1994) 17
Jones v. Bock,
549 U.S. 199 (2007) 10
Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.,
130 S. Ct. 2433 (2010) 4
Keene Corp. v. United States,
508 U.S. 200 (1993) ..... *passim*

Kendall v. United States ex rel. Stokes,
37 U.S. (12 Pet.) 524 (1838) 7
Lapides v. Board of Regents,
535 U.S. 613 (2002) 10
Larson v. Domestic & Foreign Commerce Corp.,
337 U.S. 682 (1949) 7
Lewis v. Continental Bank Corp.,
494 U.S. 472 (1990) 14, 15
Little v. Bowers,
134 U.S. 547 (1890) 17
Local No. 8-6, Oil, Chem. & Atomic Workers Int'l Union v. Missouri,
361 U.S. 363 (1960) 15
Miller v. French,
530 U.S. 327 (2000) 7, 8
Mills v. Green,
159 U.S. 651 (1895) 15
North Carolina v. Rice,
404 U.S. 244 (1971) 14, 15
Pennsylvania Railroad Co. v. United States,
363 U.S. 202 (1960) 10, 11, 12
Porter v. Warner Holding Co.,
328 U.S. 395 (1946) 7
Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998) 12
Tecon Engineers, Inc. v. United States,
343 F.2d 943 (1965) ..... *passim*

United States v. Alaska S.S. Co.,
253 U.S. 113 (1920) 15

United States v. Hamburg Amerikanische Packetfahrt-Actien Gesellschaft,
239 U. S. 466 (1916) 15

United States v. Oakland Cannabis Buyers' Co-op.,
532 U.S. 483 (2001) 7

United States v. Western Pacific R. Co.,
352 U.S. 59 (1956) 11

Statutes

5 U.S.C.
§ 704 5
§ 706 ..... *passim*
11 U.S.C.
§ 101(5) 9
§ 106(b) 10
25 U.S.C § 4011 ..... 5, 6
28 U.S.C.
§ 1331 7
§ 1331 7
§ 1491 9
§ 1491(a)(1) 4
§ 1500 ..... *passim*
§ 1505 ..... 5, 6
§ 2432 ..... 2, 5
Osage Indians Lands Act of June 28, 1906, Chapter 3572, 34 Stat. 539. 1

INTEREST OF *AMICUS CURIAE*

The Osage Nation is a federally recognized sovereign Indian nation with a reservation comprising Osage County, Oklahoma. Like the respondent, the Osage Nation is owed fiduciary duties by the United States under various federal statutes and treaties. The United States holds in trust for the benefit of the Osage Nation the mineral estate underlying Osage County, the proceeds of the mineral estate, and various other funds entrusted to it by statute. Act of June 28, 1906, ch. 3572, 34 Stat. 539. The Osage Nation thus has an interest in the proper resolution of the question presented here.[1]

SUMMARY OF ARGUMENT

The Osage Nation agrees with respondent that the text, context, history, and purpose of Section 1500 all foreclose petitioner's effort to transform that statutory shield against duplicative litigation into a sword for eviscerating express waivers of sovereign immunity and forcing parties to choose between incomplete remedies when federal law specifically authorizes both forms of relief.

For example, Congress has expressly waived the United States' sovereign immunity for both money damages claims covered by the Tucker Act, and injunctive actions seeking to halt ongoing violations of law under the Administrative Procedure Act. But

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[1] Each party has consented to the filing of this brief. Pursuant to this Court's Rule 37.6, no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

petitioner asks this Court to hold that what Congress gave with one hand, it had already taken away with Section 1500, effectively conditioning the Administrative Procedure Act's grant of a right to seek prospective injunctive relief on the aggrieved party's surrender of any suit for compensation for past harms caused by the violation. Petitioner would likewise force parties to choose between compensation for past harms and stopping new harms under the Hobbs Act or the federal courts' traditional equitable authority to enjoin or issue writs of mandamus to federal officials.

That reading of Section 1500 is not only statutorily troublesome, but also would raise a substantial constitutional question in Just Compensation Clause cases where enforcement of the constitutional right to just compensation would come at the cost of enduring irreparable, non-enjoinable harm from ongoing constitutional and statutory violations.

The problems with petitioner's position do not stop there. Its proposed reading of Section 1500 conflicts with similar language in other statutes, including the original version of the Tucker Act, as well as the Bankruptcy Code. Petitioner would also impede judicial review of any question referred by the Court of Federal Claims to an administrative agency for exercise of its primary jurisdiction, because judicial review of the agency decision would trigger dismissal of the very case from which the referral sprang. Moreover, petitioner's reading would gratuitously upset decades of settled precedent, disregard congressional acquiescence during multiple revisions of the statutory scheme of jurisdiction, and

destroy a wide swath of reliance interests, without any convincing textual justification.

Finally, petitioner's request for an advisory opinion on the validity of the time-of-filing rule in *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (1965), should be rejected here just as the argument was in *Keene Corp. v. United States*, 508 U.S. 200 (1993). The case-or-controversy requirement is an inherent limitation on the question presented and prevents the Court from reaching the *Tecon* issue in this case, particularly given the (understandable) absence of adversarial briefing by the respondent in defense of the longstanding, hornbook time-of-filing rule applied in *Tecon*.

I. SECTION 1500 DOES NOT PRECLUDE COURT OF FEDERAL CLAIMS JURISDICTION WHEN A SECOND SUIT SEEKS DISTINCT RELIEF FOR WHICH SOVEREIGN IMMUNITY HAS BEEN WAIVED

Amicus Osage Nation agrees completely with the respondent's thorough analysis of 28 U.S.C. § 1500 and its logical construction. Properly read, the text and context of Section 1500 do not bar Court of Federal Claims jurisdiction when a second lawsuit seeks a distinct form of relief for which sovereign immunity has been waived. Rather than repeat those same arguments, the Nation offers only the following supplemental points for the Court's consideration.

A. Section 1500 Must Be Construed Harmoniously With Other Waivers Of Sovereign Immunity

While petitioner focuses its (mistaken) arguments exclusively on Section 1500, this Court has long

recognized that the precise meaning of that statute's "awkward formulation" is "elusive." *Keene Corp. v. United States*, 508 U.S. 200, 210 (1993). Accordingly, in construing the statute's text, this Court should hew carefully to established presumptions about the meaning of statutory language, all of which refute petitioner's position.

First, federal statutes should not be construed to contradict or countermand each other. Instead, "equivocal language should be construed so as to secure the most harmonious results." *Calmar S.S. Corp. v. United States*, 345 U.S. 446, 456 (1953); *see, e.g., Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433, 2447 (2010) ("Where the text permits, congressional enactments should be construed to be consistent with one another."); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 879 (1994) (It is a "familiar principle of statutory construction that, when possible, courts should construe statutes * * * to foster harmony with other statutory and constitutional law.").

Yet petitioner's sweeping reading of Section 1500's jurisdictional bar would partially unravel a number of other statutory waivers of sovereign immunity. For example, after Section 1500 was enacted in 1868, Congress enacted both the Tucker Act, waiving the United States' sovereign immunity from certain money damages claims, 28 U.S.C. § 1491(a)(1), and the Administrative Procedure Act, waiving the United States' immunity from suits seeking to enjoin agency action contrary to law, 5 U.S.C. § 706. Petitioner's reading would turn the later enactment of the APA from a law designed to "provid[e] a broad spectrum of judicial review of

agency action," *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988), into a contraction of the Tucker Act's waiver and the erection of a stark choice for aggrieved plaintiffs: enforcement of the APA's right to equitable relief would come at the expense of any right to monetary compensation under the Tucker Act. And enforcement of rights under the Tucker Act would require surrender of any right to halt ongoing unlawful governmental action under the APA, no matter how irreparable and immediate the harm. A similar dilemma would be created for parties petitioning courts of appeals for review under the Hobbs Act, 28 U.S.C. § 2432, which gives the federal courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" a variety of agency orders, regulations, and actions. Exercise of that right would now come with a secret penalty revealed nowhere on the face of those laws—the loss of any right to monetary compensation for past harms that, under petitioner's view, are "associated in any way" (U.S. Br. 21) with the Hobbs Act claim.

In addition, although Congress expressly and separately waived the United States' immunity from compensation claims by Indian tribes, 28 U.S.C. § 1505, and provided tribes with an APA-enforceable right to an equitable accounting, American Indian Trust Fund Management Reform Act of 1994, 25 U.S.C. § 4011, petitioner would read those remedies as an either/or proposition.

Equally important, under petitioner's view, Congress's direction that the APA should be available whenever "there is no other adequate remedy in a court," 5 U.S.C. § 704, would have to be rewritten to

say that APA review is available when "there is no other adequate remedy in a court, *except that even an inadequate remedy in the Court of Federal Claims will require forgoing APA review.*" That is because petitioner's reading would prevent any plaintiff seeking retrospective monetary relief in the Court of Federal Claims from also seeking a declaration and injunction against ongoing violations of the law under the APA. And that APA bar would apply even though this Court has recognized for more than a century that serial damages claims are not an adequate remedy for "perpetually recurring denials of [a plaintiff's] rights." *Franklin Tel. Co. v. Harrison*, 145 U.S. 459, 474 (1892).

General invocations of sovereign immunity principles are no answer to that problem. Petitioner does not dispute that Congress intended the Tucker Act and the APA, and the Indian Tucker Act and the 1994 Trust Fund law, to coexist in full and to provide aggrieved plaintiffs access to both remedies in full. Petitioner, in fact, agrees that sovereign immunity has been waived and that lawsuits could be brought for both damages and equitable relief, provided that the lawsuits are brought back to back.

Petitioner just does not want the lawsuits brought side by side. That argument, however, does nothing to advance sovereign immunity principles. The immunity has already been waived. The liability and resource costs of the two litigations are the same regardless of the order in which they proceed. Petitioner just favors a reading that ensures that the time spent litigating a suit for one remedy will commonly run out the statute of limitations on the second suit. But courts should not construe federal

law to pit one waiver of sovereign immunity against another.

Second, petitioner's reading of Section 1500 would construe the statute as placing a burdensome condition on the district courts' traditional equitable power to issue writs of mandamus to, and to enjoin unconstitutional and *ultra vires* action by, government officials. *See Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 623-624 (1838); 28 U.S.C. § 1361 (authorizing mandamus); *Ex parte Young*, 209 U.S. 123, 162-163 (1908); *Bell v. Hood*, 327 U.S. 678, 684 (1946) (recognizing the "jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution"); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (Fifth Amendment and 28 U.S.C. § 1331 provide a remedy for unconstitutional racial discrimination). For example, if a land owner's property is the object of an ongoing governmental trespass or regulatory taking, petitioner's reading of Section 1500 would vitiate the federal courts' authority to enjoin such conduct and to prevent irreparable harm unless the land owner forgoes enforcing his right to compensation in the Court of Federal Claims for harm already inflicted.

This Court, however, will not construe a statute to displace the traditional equitable authority of courts "absent the 'clearest command,'" or an "inescapable inference" to the contrary. *Miller v. French*, 530 U.S. 327, 340 (2000) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979), and *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)); *see also United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001) (statute must "clearly

provide[] otherwise). Nothing in Section 1500 clearly or inescapably commands such an inroad on the inherent equitable power of federal courts, particularly when that power is directed to halting unconstitutional governmental conduct.

Indeed, petitioner's argument raises constitutional doubts at least with respect to takings claims. For such Fifth Amendment claims, the Constitution itself waives immunity. *See, e.g., Jacobs v. United States*, 290 U.S. 13, 16 (1933). Whether Congress could condition the Constitution's self-executing mandate that just compensation be paid on the property owners' surrender of their right to an injunction against ongoing and unconstitutional irreparable harm is a substantial constitutional question that Section 1500 should be construed to avoid. *See, e.g., French*, 530 U.S. at 341.

Third, Section 1500's jurisdictional limit must be read in the context of similar language in other statutes. Most important among these, it must be read *in pari materia* with the proximately enacted affirmative grant of jurisdiction in the Tucker Act. When enacted in 1887 (shortly after the passage of Section 1500's predecessor), the Tucker Act employed the same "in respect of" a "claim" language. Act of Mar. 3, 1887, ch. 359, §§ 1-2, 24 Stat. 505, 505. And Congress used that language in a manner that is nearly synonymous with the phrasing "for" a claim—a far tighter logical relationship than the nearly boundless "associated in any way" or "has some 'relation or reference to'" meaning advocated by petitioner (Br. 21).

More specifically, the Tucker Act's contemporaneous original language granted the

Court of Claims jurisdiction over, *inter alia*, "[a]ll claims * * * for damages, liquidated or unliquidated, in cases not sounding in tort, *in respect of* which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable." Act of Mar. 3, 1887, ch. 359, §§ 1-2, 24 Stat. 505, 505 (reproduced at Resp. Br. 5a-6a) (emphasis added). Read in that context, the "in respect of" language signifies simply those claims for which the hypothesized suability of the United States could be established. That reading was confirmed when Congress deleted the "in respect of" language from the Tucker Act in 1948 "as unnecessary" because "the Court of Claims manifestly, under this section will determine whether a petition against the United States states a cause of action." Revision Notes to 28 U.S.C. § 1491.

Likewise, Section 1500's reference to suits "in respect to" a "claim" focuses on whether the suit seeks the same recovery as the claim pressed in the Court of Federal Claims. That far narrower and statutorily symmetrical reading forecloses petitioner's broad construction of Section 1500 and would preserve the ability of plaintiffs to seek the distinct damages and equitable remedies for which Congress has expressly waived sovereign immunity.

That reading is further supported by language in the Bankruptcy Code. The Code defines a "claim" as either a "right to payment" or a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. § 101(5). It then provides that "[a] governmental unit that has filed a proof of claim * * * is deemed to have waived

sovereign immunity *with respect to a claim* against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose." 11 U.S.C. § 106(b) (emphasis added). Here, as in other situations where the term "in respect to," "in respect of," or "with respect to" refers to a claim, the phrasing means little if anything more than "for a claim."[2] Indeed, reading it more broadly would expand the waiver of sovereign immunity under the Bankruptcy Act. Petitioner's invocation of sovereign immunity principles thus cuts both ways in construing the "in respect of" language in the Bankruptcy Code (and the original Tucker Act), which Congress presumably used in a consistent manner across analogous federal legislation. *See, e.g., Jones v. Bock*, 549 U.S. 199, 220-221 (2007).

Fourth, Section 1500 should be construed to facilitate operation of the primary jurisdiction doctrine and thus as "effecting a 'symmetrical and coherent regulatory scheme.'" *BP America Prod. Co. v. Burton*, 549 U.S. 84, 99 (2006) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). Indeed, that is precisely how this Court implemented Section 1500 in *Pennsylvania Railroad Co. v. United States*, 363 U.S. 202 (1960), and in so doing, this Court took exactly the opposite approach

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[2] Interpreting "in respect to" a "claim" as only a minor variation on the phrasing "for" a "claim" is also consistent with this Court's own recent usage in the sovereign immunity context. *See Lapides v. Board of Regents*, 535 U.S. 613, 617 (2002) ("It has become clear that we must limit our answer to the context of state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings.").

to the jurisdictional bar as that advocated by petitioner.

In *Pennsylvania Railroad*, the plaintiff railroad had sued in the Court of Claims to recover from the United States an underpayment of shipping charges. 363 U.S. at 203. In defense, the United States challenged the validity of the relevant tariff. The Court of Claims then stayed the case and referred the issue of the tariff's validity to the Interstate Commerce Commission, *ibid.*, which had primary jurisdiction over that question, *see United States v. Western Pacific R. Co.*, 352 U.S. 59, 62-63 (1956). After the ICC struck down the tariff, the railroad sought judicial review of the ICC order in district court. *Pennsylvania Railroad*, 363 U.S. at 203. The United States then moved in the Court of Claims for dismissal under Section 1500. *Id.* at 203-204. The Court of Claims refused to dismiss the case, instead exercising its jurisdiction to lift the stay and to enter judgment consistent with the ICC's order. *Id.* at 204.

This Court reversed. Critically, it did not hold that the Court of Claims lacked jurisdiction, as petitioner's reading of Section 1500 would dictate. Quite the opposite, this Court held that the Court of Claims should have stayed its proceedings—that is, it should have continued to exercise jurisdiction—pending district court review of the ICC's order. *Pennsylvania Railroad*, 363 U.S. at 205-206. As the Court noted, foreclosing Court of Claims jurisdiction while the agency ruling undergoes district court review would leave any party whose claim for damages against the United States implicates an issue within an agency's primary jurisdiction completely "bound by the [agency's] order although

completely denied any judicial review of that order." *Id.* at 204.

Petitioner's approach thus would wreak havoc with the primary jurisdiction doctrine's traditional division of labor, and the fair opportunity for subsequent judicial review of agency rulings that is part and parcel of that doctrine. That cannot be what Congress intended when it enacted the APA and related agency-review statutes. To the contrary, Congress has reenacted Section 1500 twice with *Pennsylvania Railroad* on the books, without any textual response or even a non-textual complaint. *See also Calmar*, 345 U.S. at 456 (interpreting jurisdictional statutes, including Section 1500, in a manner that avoids subjecting plaintiffs to an unclear jurisdictional rule that would force an uncertain election between district court and the Court of Claims, on the ground that "equivocal language should be construed so as to secure the most harmonious results").

Finally, there is no doubt that the Court must give full effect to jurisdictional limitations prescribed by Congress, and parties cannot, by their conduct, alter those jurisdictional bounds. *See, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). But when the statutory language is as "awkward" as Section 1500 and its meaning as "elusive," *Keene*, 508 U.S. at 210, this Court's construction of such statutory terms should favor (i) the longstanding construction given the statute for half a century by courts and parties alike under *Casman v. United States*, 135 Ct. Cl. 647 (1956); (ii) congressional acquiescence in *Casman* and *Pennsylvania Railroad* for an equally lengthy period of time; and (iii) the

substantial reliance interests of litigants who have sought to protect their rights in the way the courts dictated. *See Bate Refrigerating Co. v. Sulzberger*, 157 U.S. 1, 34 (1895) (when choosing between "either one of two constructions" of ambiguous statutory text, "this court, without departing from sound principle, may well adopt that construction which is in harmony with the settled practice of the executive branch of the government, and with the course of judicial decisions in the circuit courts of the United States, especially if there be reason to suppose that vast interests may have grown up under that practice and under judicial decisions, which may be disturbed or destroyed by the announcement of a different rule").

B. This Court Lacks Jurisdiction To Address The *Tecon* Time-Of-Filing Rule

The Osage Nation agrees with respondent and the Chamber of Commerce that this Court should reject petitioner's extraordinary request that the Court reach out and decide other issues not remotely presented by the Tohono O'odham case. Specifically, the United States urges (Br. 35-39) the Court to overrule the Court of Claims' decision in *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (1965), which applied the well-settled time-of-filing rule for jurisdiction to Section 1500, *id.* at 945-950.

Tecon's time-of-filing jurisdictional rule is a straightforward application of "hornbook law (quite literally) taught to first-year law students in any basic course on federal civil procedure," *Grupo Dataflux v. Atlas Global Grp.*, 541 U.S. 567, 570-571 (2004). Under that longstanding jurisdictional rule, a court's jurisdiction "depends upon the state of things

at the time * * * the action [is] brought." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003). Thus, if the plaintiff does not "ha[ve] pending" a suit on the same claim in another court when the Court of Federal Claims action commences, 28 U.S.C. § 1500, jurisdiction attaches. In *Keene*, this Court applied that rule to Section 1500. 508 U.S. at 207.

Notwithstanding the time-of-filing rule's hoary pedigree, *Keene*'s application of the rule to Section 1500, the United States' own endorsement of that application in *Keene*, U.S. Br. 29, and the United States' direct support for the rule's application in *Tecon* itself, *id.* at 38 n.19, the United States now argues exactly the opposite, asking this Court to overrule *Tecon* and create an exception to the time-of-filing rule in the *Tecon* scenario. This Court should decline that invitation for three reasons.

First, and most fundamentally, the issue is not presented by this case. As the United States acknowledges (Br. 37 n.8) and respondent explains (Br. 40-41), respondent filed suit in federal district court *first* and the Court of Federal Claims second. The facts of this case thus in no way present the question whether, after suit is filed and jurisdiction has fully vested in the Court of Federal Claims, the later filing of suit in another court can divest the Court of Federal Claims of jurisdiction.

Few principles of law are more basic or well-established than the rule that "Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them.'" *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)). The essential purpose of

Article III's case-or-controversy requirement is to confine federal courts "to resolving 'real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Lewis*, 494 U.S. at 477 (quoting *Rice*, 404 U.S. at 246). Because this case does not involve the time-of-filing rule at all, this Court "has no authority * * * to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

Second, and relatedly, the issue is not and cannot be subsumed within the Question Presented, because Article III is an inherent limitation on the scope of the Question Presented to this Court for decision in any case. "[T]his court 'is not empowered * * * to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.'" *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920) (quoting *California v. San Pablo & Tulare R. Co.*, 149 U. S. 308, 314 (1893)); *accord United States v. Hamburg Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U. S. 466, 475, 476 (1916). Thus, regardless of how a question presented might be verbally formulated, Article III dictates that the Court's "power only extends over, and is limited by, the conditions of the case now before [it]." *American Book Co. v. Kansas ex rel. Nichols*, 193 U.S. 49, 52 (1904); *accord Local No. 8-6, Oil, Chem. & Atomic Workers Int'l Union v. Missouri*, 361 U.S. 363, 370 (1960).

Indeed, in *Keene*, this Court rejected an identical request to go beyond the facts of the case presented and opine on the Federal Circuit's *Tecon* decision because, just as here, "this case does not raise that issue." 508 U.S. at 209 n.4. Underscoring the point, the Court again explained that it was "unnecessary to consider, much less repudiate, the 'judicially created exceptions' to § 1500 found in *Tecon Engineers*" and other Federal Circuit cases precisely because "the facts of this case" do not present the question. *Id.* at 216. The Court made clear that its exercise of certiorari did not license it to provide "an advisory opinion," *id.* at 217 n.13, on legal questions not presented by the "facts of th[e] case," *id.* at 216. The United States thus asks this Court to do precisely what the Court twice refused to do in *Keene*.

Third, the United States' footnoted assertion that the Federal Circuit's brief reference to *Tecon* constituted the *ratio decidendi* of the case (U.S. Br. 37 n.8) lacks merit. The Federal Circuit mentioned *Tecon* only in the course of responding to the government's "policy" argument. Pet. App. 15a-17a. It was not the "line of thought pervading and controlling the whole opinion," *Capital Traction Co. v. Hof*, 174 U.S. 1, 12 (1899). To the court of appeals, it was "dispositive," Pet. App. 9a, "that the Nation's complaint in the Court of Federal Claims seeks relief that is different from the relief sought in its *earlier-filed* district court action," Pet. App. 1a-2a (emphasis added). *See Davis v. Elmira Sav. Bank*, 161 U.S. 275, 286-287 (1896) (*ratio decidendi* of prior opinion is

necessarily limited by the factual "case presented" in the prior ruling).[3]

Furthermore, if the Federal Circuit had actually gone so far as to *decide* a legal question not presented by the facts of the case, then the proper remedy for this Court would be to vacate and remand, not to compound the Article III violation by issuing its own advisory opinion on a legal question "when there is nothing in dispute" on that point in the case, *Little v. Bowers*, 134 U.S. 547, 558 (1890).

At bottom, the United States simply dislikes language in the court of appeals' opinion. But "[t]his Court 'reviews judgments, not statements in opinions.'" *Johnson v. De Grandy*, 512 U.S. 997, 1003 n.5 (1994). When "unnecessarily broad statements are made" by a court of appeals, it is this Court's "duty to look beyond the broad sweep of the language and determine for [itself] precisely the ground on which the judgment rests," *Black v. Cutter Labs.*, 351 U.S. 292, 298 (1956), not to join in and propound declarations about the "proper overall interpretation of the [law]" (U.S. Br. 37 n.8) unhinged from the actual case or controversy presented.

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[3] Beyond that, *Tecon* certainly was far less interwoven with the court of appeals' decision in this case than it was in *Keene*, where the Federal Circuit went so far as to overrule *Tecon*. 508 U.S. at 216. This Court nevertheless concluded that the correctness of *Tecon* was not fairly presented for this Court's review. 508 U.S. at 215-216.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

PATRICIA A. MILLETT
Counsel of Record
DONALD R. PONGRACE
JAMES P. TUITE
MERRILL C. GODFREY
JAMES T. MEGGESTO
AKIN GUMP STRAUSS
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000
pmillett@akingump.com

Attorneys for Amicus Curiae

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

TOHONO O'ODHAM NATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF PROFESSOR GREGORY C. SISK AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

GREGORY C. SISK
Counsel of Record
UNIVERSITY OF ST. THOMAS
SCHOOL OF LAW
1000 LaSalle Avenue
Minneapolis, Minnesota 55403
(651) 962-4923
gcsisk@stthomas.edu

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342 2831

49

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 6

I. THE COURT OF FEDERAL CLAIMS HAS EXCLUSIVE JURISDICTION OVER INDIAN BREACH OF TRUST CLAIMS WHEN A MONEY JUDGMENT WOULD BE AN ADEQUATE REMEDY 7

A. Under the Indian Tucker Act, the Court of Federal Claims is the Forum Designated by Congress for Breach of Trust Claims Alleging Government Mismanagement of Indian Assets 7

B. This Court's *Bowen v. Massachusetts* Decision, Which Approved District Court Review of Federal-State Medicaid Disputes under the Administrative Procedure Act, Did Not Suggest that Traditional Tucker Act Claims Could be Diverted from the Court of Federal Claims 10

C. Breach of Trust Claims Alleging Government Mismanagement of Indian Assets May be Adequately Remedied in the Court of Federal Claims, and Thus Fall Outside the Scope of the Administrative Procedure Act for Judicial Review In District Court 17

TABLE OF CONTENTS – Continued

Page

1. The *Cobell* Case in the District of Columbia was an Unprecedented Projection of District Court Authority into the Province of the Court of Federal Claims over Indian Breach of Trust Claims 17

2. When an Indian Tribe Alleges a Breach of Trust by the Government in Management of Assets, the Court of Federal Claims May Afford a More Than Adequate Remedy 20

D. With Nationwide Appellate Jurisdiction over Tucker Act Matters, the Court of Appeals for the Federal Circuit has Confirmed the Exclusive Jurisdiction of the Court of Federal Claims When a Claim may be Adequately Remedied by a Money Judgment 28

II. THIS COURT SHOULD ADDRESS DUPLICATIVE LITIGATION AGAINST THE UNITED STATES BY CLARIFYING JURISDICTIONAL LINES AND DISCOURAGING ATTEMPTS TO BYPASS THE COURT OF FEDERAL CLAIMS WHEN A CLAIM FOR A MONEY JUDGMENT IS AVAILABLE 33

CONCLUSION 37

TABLE OF AUTHORITIES

Page

CASES:

Amoco Prod. Co. v. Hodel, 815 F.2d 352 (5th Cir. 1987) 26

Assiniboine & Sioux Tribes v. Norton, 527 F. Supp. 2d 130 (D.D.C. 2007) 20

Bowen v. Massachusetts, 487 U.S. 879 (1988) ..... *passim*

Califano v. Sanders, 430 U.S. 99 (1977) 11

Christopher Village, L.P. v. United States, 360 F.3d 1319 (Fed. Cir. 2004) 32

Cobell v. Babbitt, 30 F. Supp. 2d 24 (D.D.C. 1998) 19

Cobell v. Babbitt, 37 F. Supp. 2d 6 (D.D.C. 1999) 17

Cobell v. Babbitt, 91 F. Supp. 2d 1 (D.D.C. 1999) ..... *passim*

Cobell v. Kempthorne, 455 F.3d 317 (D.C. Cir. 2006) 18

Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001) 3, 20, 21, 32

Cobell v. Salazar, 573 F.3d 808 (D.C. Cir. 2009) 18

Consol. Edison Co. v. United States Dep't of Energy, 247 F.3d 1378 (Fed. Cir. 2001) 4, 30, 31, 33

Dep't of the Army v. Blue Fox, 525 U.S. 255 (1999) 15, 22

TABLE OF AUTHORITIES – Continued

Page

District of Columbia v. United States, 67 Fed. Cl. 292 (2005) 2

Eastern Shawnee Tribe v. United States, 582 F.3d 1306 (Fed. Cir. 2009) 5, 26, 32

Frantz Equip. Co. v. United States, 98 F. Supp. 579 (Ct. Cl. 1951) 35

Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) 14

John R. Sand & Gravel Co. v. United States, 552 U.S. 130 (2008) 2

Keene Corp. v. United States, 508 U.S. 200 (1993) 35, 37

Klamath & Modoc Tribes v. United States, 174 Ct. Cl. 483 (1966) 27

Massachusetts v. Departmental Grant Appeals Bd., 815 F.2d 778 (1st Cir. 1987) 10

New Mexico v. Regan, 745 F.2d 1318 (10th Cir. 1984) 19

Osage Tribe v. United States, 2005 WL 578171 (D.D.C. Mar. 9, 2005) 33, 34

Osage Tribe v. Norton, No. 05-1383 (Fed. Cir. July 8, 2005) (Order) 34

Seminole Nation v. United States, 316 U.S. 286 (1942) 10

Skokomish Indian Tribe v. United States, 410 F.3d 506 (9th Cir. 2005) 2

TABLE OF AUTHORITIES – Continued

Page

Suburban Mortgage Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev., 480 F.3d 1116 (Fed. Cir. 2007) 1, 4, 12, 31

United States v. Hohri, 482 U.S. 64 (1987) 4, 28, 29

United States v. Mitchell, 463 U.S. 206 (1983) 3, 10, 20, 21, 23

United States v. Navajo Nation, 537 U.S. 488 (2003) 3, 10

United States v. Norwood, 602 F.3d 830 (7th Cir. 2010) 1

United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003) 3, 10

Western Shoshone Nat'l Council v. United States, 357 F. Supp. 2d 172 (D.D.C. 2004) 32

Yankton Sioux Tribe v. United States, 84 Fed. Cl. 225 (2008) 26

STATUTES:

Administrative Procedure Act:

5 U.S.C. §§ 701-706 3

5 U.S.C. § 702 ..... *passim*

5 U.S.C. § 704 ..... *passim*

5 U.S.C. § 706(1) 22

28 U.S.C. § 1292(d)(4) 3, 30, 34, 35

28 U.S.C. § 1292(d)(4)(A) 4, 5, 29, 38

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 1295(a)(2) 4, 28

28 U.S.C. § 1295(a)(3) 4, 28

28 U.S.C. § 1331 11

Tucker Act:

28 U.S.C. § 1346(a)(2) 8, 28

28 U.S.C. § 1491(a)(1) 8

28 U.S.C. § 1491(a)(2) 9, 26

28 U.S.C. § 1362 12

28 U.S.C. § 1500 ..... *passim*

Indian Tucker Act, 28 U.S.C. § 1505 ..... 3, 9

28 U.S.C. § 1631 ..... 5, 24, 34, 35, 38

28 U.S.C. § 2507 27

28 U.S.C. § 2521 27

42 U.S.C. § 1316(a)(3) 15

Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396v 13

42 U.S.C. § 1396b(a) 13

Act of February 24, 1855, ch. 122, 10 Stat. 612 7

Tucker Act of 1887, ch. 359, 24 Stat. 505 (1887) 7

Indian Claims Commission Act, ch. 959, § 24, Pub. L. No. 79-726, 60 Stat. 1055, 1057 (1946) 9

TABLE OF AUTHORITIES – Continued

Page

Remand Act of 1972, Pub. L. No. 92-415, 86 Stat. 652 ..... 8, 9, 26

Pub. L. No. 100-702, Title V, § 501, 102 Stat. 4642 (1988) 2, 29

LEGISLATIVE MATERIALS:

H.R. Rep. No. 92-1023 (1972) 26

H.R. Rep. No. 94-1656 (1976) 11

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S. Rep. No. 97-275 (1981) 28

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C. Stanley Dees, *The Future of the Contract Disputes Act: Is It Time to Roll Back Sovereign Immunity?*, 28 Pub. Cont. L.J. 545 (1999) 8

TABLE OF AUTHORITIES – Continued

Page

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Judge S. Jay Plager, *Money and Power: Observations on the Jurisdiction of the U.S. Court of Federal Claims*, 17 Fed. Cir. B.J. 371 (2008) 2

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Gregory C. Sisk, *Litigation With the Federal Government* (ALI-ABA, 4th ed., 2006) 1, 6

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TABLE OF AUTHORITIES – Continued

Page

Gregory C. Sisk, *Tucker Act Appeals to the Federal Circuit*, 36 Fed. B. News & J. 41 (1989) 2

Gregory C. Sisk, *Yesterday and Today: Of Indians, Breach of Trust, Money, and Sovereign Immunity*, 39 Tulsa L. Rev. 313 (2004) 10

STATEMENT OF INTEREST OF AMICUS CURIAE

As amicus curiae and the author of this brief, my name is Gregory C. Sisk.[1] I am the Orestes A. Brownson Professor of Law at the University of St. Thomas (Minnesota). My only interest in this matter is that of a legal scholar.

For more than two decades, my scholarly work has focused on civil litigation with the federal government. I have published both a treatise and the only law school casebook on the subject. *Litigation With the Federal Government* (ALI-ABA, 4th ed., 2006); *Litigation With the Federal Government: Cases and Materials* (Foundation Press, 2d ed., 2008). I also have written several law review articles on the Tucker Act, the Court of Federal Claims (CFC), and Indian breach of trust claims against the United States, some of which are cited in this brief.

My scholarly work on these subjects is cited regularly by the federal courts. *See, e.g.*, *United States v. Norwood*, 602 F.3d 830, 834 (7th Cir. 2010); *Suburban Mortgage Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 480 F.3d 1116, 1123 n.12 (Fed.

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[1] The parties have consented in writing to the filing of this brief. No counsel for a party authored this brief in whole or in part. No person or entity made a monetary contribution to the preparation and submission of this brief other than me as Amicus Curiae and my employer (the University of St. Thomas by providing a professional development fund to each faculty member to support scholarly and public service work).

Cir. 2007); *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 511 n.3 (9th Cir. 2005); *District of Columbia v. United States*, 67 Fed. Cl. 292, 305 (2005); *see also* Judge S. Jay Plager, *Money and Power: Observations on the Jurisdiction of the U.S. Court of Federal Claims*, 17 Fed. Cir. B.J. 371, 374 (2008) (referring to one of my articles as the "definitive piece" on CFC jurisdiction over money claims and saying "it is always refreshing to find a law review article that addresses issues that are relevant to the work of judges and practicing lawyers").

As a former appellate attorney with the Civil Division of the U.S. Department of Justice and as an attorney admitted to the active practice of law, I have litigated cases on behalf of both the government and private parties that implicate the jurisdictional authority of the CFC. Most recently, I was co-counsel for the petitioner in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008).

During my service in the Department of Justice, I drafted legislation to encourage early resolution of questions about the respective jurisdiction of the District Court and the CFC. *See Tucker Act Appeals to the Federal Circuit*, 36 Fed. B. News & J. 41 (1989). This legislation, enacted by Congress in 1988, permits an interlocutory appeal by either the plaintiff or the government to the Court of Appeals for the Federal Circuit from an adverse District Court ruling on a motion to transfer the action to the CFC. Pub. L.

No. 100-702, Title V, § 501, 102 Stat. 4642 (1988) (codified at 28 U.S.C. § 1292(d)(4)).

SUMMARY OF THE ARGUMENT

Since the enactment of the Indian Tucker Act in 1946, 28 U.S.C. § 1505, the United States Court of Federal Claims (CFC) has been the forum for Indian breach of trust claims alleging the United States Government's failure to uphold its fiduciary responsibilities in managing Native American assets. This Court's landmark Indian breach of trust decisions over the decades have been rendered in cases that began in the CFC or its predecessor. *See, e.g.*, *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003); *United States v. Navajo Nation*, 537 U.S. 488 (2003); *United States v. Mitchell*, 463 U.S. 206 (1983).

The longstanding jurisprudence that Indian breach of trust claims involving assets held in trust by the United States are to be brought in the CFC was disturbed by an aberrational decision in the United States District Court for the District of Columbia. *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 24-28 (D.D.C. 1999), *aff'd*, *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001). In that case, the District Court asserted authority under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, to adjudicate the accounting of government-established financial accounts for distribution of profits derived from Native American resources held in trust by the United

States. In so ruling, the District Court aggressively extended this Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879 (1988) – a unique case involving Federal-State administration of the Medicaid health care program which this Court had found unsuited for review in the CFC.

The United States Court of Appeals for the Federal Circuit has nationwide and exclusive appellate jurisdiction over Tucker Act claims. 28 U.S.C. § 1295(a)(2), (3); *see generally United States v. Hohri*, 482 U.S. 64, 71-76 (1987). In addition, Congress has granted the Federal Circuit special authority to hear interlocutory appeals from cases that arguably have been mis-filed in District Court rather than in the CFC under the Tucker Act. *See* 28 U.S.C. § 1292(d)(4)(A).

Because the APA expressly excludes claims for which an adequate remedy lies in another court, 5 U.S.C. § 704, the Federal Circuit has confirmed that the CFC, rather than the District Court, retains its traditional and exclusive jurisdiction to hear claims against the Federal Government that are adequately remedied by a money judgment. *See, e.g., Consol. Edison Co. v. United States Dep't of Energy*, 247 F.3d 1378 (Fed. Cir. 2001); *Suburban Mortgage Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 480 F.3d 1116 (Fed. Cir. 2007). The Federal Circuit specifically has reaffirmed the exclusive jurisdiction of the CFC over Indian breach of trust claims alleging Government mismanagement of Native American resources.

Eastern Shawnee Tribe v. United States, 582 F.3d 1306, 1308-09 (Fed. Cir. 2009).

Several Native American plaintiffs, including the Tohono O'odham Nation, have continued to file breach of trust claims alleging Government mismanagement of resources and financial accounts in the District Court for the District of Columbia. The Government has not employed the procedural tool designed by Congress for this circumstance, which is a motion to transfer the District Court action to the CFC under 28 U.S.C. § 1631, followed if necessary by an interlocutory appeal to the Federal Circuit for early resolution of the jurisdictional conflict under 28 U.S.C. § 1292(d)(4)(A). To add to the jurisdictional chaos, several of these tribes, again including the Tohono O'odham Nation, have filed parallel lawsuits in the CFC. Thus the stage was set for the present collision between dual lawsuits and the attendant controversy over the application of 28 U.S.C. § 1500.

This Court should clarify that the CFC is the forum for claims, such as the Indian breach of trust claims involved here, that ultimately seek or could be satisfied by a money judgment (and collateral relief). But for the mistaken premise by the tribes that the District Court rather than the CFC may hear an Indian breach of trust claim involving alleged Government mis-management of trust assets, no occasion would arise for the filing of parallel claims in both courts, and the § 1500 problem would evaporate.

ARGUMENT

By focusing on whether 28 U.S.C. § 1500 precludes the filing of nearly simultaneous lawsuits arising out of the same operative facts in two different federal courts, the parties neglect the more fundamental question of whether each of those federal courts has proper authority over the type of claim presented. If, as submitted in this amicus brief, the District Court does not have authority to adjudicate an Indian breach of trust claim that can be adequately remedied by a money judgment in the Court of Federal Claims, then the application of § 1500 may be unnecessary or superfluous in this case to implement the statutory policy of discouraging duplicative litigation against the Federal Government. Even if the lawsuit filed in the CFC were to be dismissed under § 1500, the parallel lawsuit filed in the District Court should be transferred to the CFC, thus effectively returning the matter to square one.

I. THE COURT OF FEDERAL CLAIMS HAS EXCLUSIVE JURISDICTION OVER INDIAN BREACH OF TRUST CLAIMS WHEN A MONEY JUDGMENT WOULD BE AN ADEQUATE REMEDY

A. Under the Indian Tucker Act, the Court of Federal Claims is the Forum Designated by Congress for Breach of Trust Claims Alleging Government Mismanagement of Indian Assets

"What today is the Court of Federal Claims shared its birth with that of the first significant grant of permission by the sovereign United States to its citizens to seek relief against it in the courts." Gregory C. Sisk, *Litigation with the Federal Government* § 4.02(a)(1), at 226 (4th ed. 2006). The United States Court of Claims was created by Congress in 1855 and given authority to hear claims against the United States founded upon federal statutes, regulations, and contracts. Act of February 24, 1855, ch. 122, 10 Stat. 612. In 1887, the Tucker Act was enacted to confirm the nationwide jurisdiction of the Court of Claims over money claims (other than in tort) based on federal statutes, executive regulations, and contract, while also expanding the court's authority to include actions based on the Constitution. Tucker Act of 1887, ch. 359, 24 Stat. 505 (1887); *see generally* Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 Vill. L. Rev. 155, 176-77 (1998).

The Tucker Act is a jurisdictional statute that also waives the Federal Government's sovereign immunity for monetary claims "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. §§ 1346(a)(2), 1491(a)(1). Trial court jurisdiction over "Big" Tucker Act claims against the United States is assigned by § 1491(a)(1) to the CFC. District Courts retain concurrent jurisdiction over Tucker Act claims for $10,000 or less under § 1346(a)(2), which is commonly known as the "Little" Tucker Act.

The Tucker Act remains the "foundation stone" in the adjudication of money claims against the United States. C. Stanley Dees, *The Future of the Contract Disputes Act: Is It Time to Roll Back Sovereign Immunity?*, 28 Pub. Cont. L.J. 545, 546 (1999). Congress has designated the CFC as the forum for demands against the public treasury, relying on its expertise with appropriations and other money-mandating statutes and its experience in adjudicating complex cases involving fiscal matters, financial transactions, and public monetary obligations.

In recent decades, Congress has granted to the CFC meaningful and considerable, although limited, remedial powers beyond awarding a money judgment. In 1972, Congress enacted the Remand Act as an amendment to the Tucker Act, authorizing the CFC "[t]o provide an entire remedy and to complete the

relief afforded by the judgment" by granting certain equitable relief attached to a money judgment, including "correction of applicable records." Remand Act of 1972, Pub. L. No. 92-415, 86 Stat. 652 (codified at 28 U.S.C. § 1491(a)(2)).

The CFC long has served as Congress's chosen forum for adjudicating financial and property disputes that arise from the nation's responsibilities to indigenous peoples. In 1946, Congress enacted the Indian Tucker Act, which as amended directs the exercise of jurisdiction by the Court of Federal Claims –

> in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group.

28 U.S.C. § 1505 (originally enacted as the Indian Claims Commission Act, ch. 959, § 24, Pub. L. No. 79-726, 60 Stat. 1055, 1057 (1946)).

With the enactment of the Indian Tucker Act, it would "never again be necessary to pass special Indian jurisdictional acts in order to permit the Indians to secure a court adjudication on any misappropriations of Indian funds or of any other Indian property by Federal officials that might occur in the

future." 92 Cong. Rec. 5313 (1946) (statement of Rep. Jackson). On the Indian Tucker Act and breach of trust claims, *see generally Cohen's Handbook of Federal Indian Law* § 5.05[1][b], at 426-32 (Nell Jessup Newton et al. eds., 2005); Gregory C. Sisk, *Yesterday and Today: Of Indians, Breach of Trust, Money, and Sovereign Immunity,* 39 Tulsa L. Rev. 313, 316-17 (2004).

This Court's landmark Indian breach of trust decisions over the decades have been rendered on review of claims originally filed in the CFC or its predecessor. *See, e.g., United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003); *United States v. Navajo Nation*, 537 U.S. 488 (2003); *United States v. Mitchell*, 463 U.S. 206 (1983); *Seminole Nation v. United States*, 316 U.S. 286 (1942).

B. This Court's *Bowen v. Massachusetts* Decision, Which Approved District Court Review of Federal-State Medicaid Disputes under the Administrative Procedure Act, Did Not Suggest that Traditional Tucker Act Claims Could be Diverted from the Court of Federal Claims

When considering amendments to the Administrative Procedure Act (APA) in 1976, Congress sought to pull together the "patchwork" of various statutory waivers of federal sovereign immunity in the hopes of regularizing this area of law and reducing confusion. *See Massachusetts v. Departmental Grant Appeals*

Bd., 815 F.2d 778, 782-83 & n.3 (1st Cir. 1987). By providing that the APA applies only to actions "seeking relief other than money damages," 5 U.S.C. § 702, and where "there is no other adequate remedy in a court," 5 U.S.C. § 704, Congress designed the APA to be complementary with the Tucker Act, not overlapping or conflicting. *See* H.R. Rep. No. 94-1656, at 11 (1976) (the "explicit exclusion of monetary relief [from the amendment to the APA leaves] limitations on the recovery of money damages contained in * * * the Tucker Act * * * unaffected"); Richard H. Fallon, Jr., *Claims Court at the Crossroads*, 40 Cath. U. L. Rev. 517, 527 (1991) ("Congress clearly seems to have contemplated that there can be no suit in federal district court if the suit can instead be brought in the Claims Court under the Tucker Act.").

In *Bowen v. Massachusetts*, 487 U.S. 879 (1988), this Court allowed a singular type of plaintiff to bring a peculiar claim for monetary relief under the APA framework rather than under the purview of the Tucker Act. Many feared that the Court had blurred the lines between the APA and the Tucker Act, which is also the jurisdictional border between the District Courts and the CFC.[2] *See Bowen*, 487 U.S. at 930

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[2] The APA does not provide an independent grant of subject-matter jurisdiction to the federal courts. *See Califano v. Sanders*, 430 U.S. 99, 106-07 (1977). When a claim falls inside the scope of the APA's limited waiver of federal sovereign immunity, then the general federal-question jurisdictional statute, 28 U.S.C. § 1331, or the Indian tribe jurisdictional

(Continued on following page)

(Scalia, J., dissenting) ("[T]he jurisdiction of the Claims Court has been thrown into chaos."); *Suburban Mortgage Assocs.*, 480 F.3d at 1122 (saying that, through *Bowen*, "the [APA/Tucker Act] barrier sprang a leak, a leak that has threatened to become a gusher"); Marcia G. Madsen & Gregory A. Smith, *The Court of Federal Claims in the 21st Century: Specific Proposals for Legislative Changes*, 71 Geo. Wash. L. Rev. 824, 830 (2003) (describing *Bowen* as "upset[ting]" "fundamental understandings" about CFC and District Court jurisdiction). *See generally* Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims against the United States,* 71 Geo. Wash. L. Rev. 602 (2003).

As discussed below, however, the *Bowen* decision never suggested that the APA could be used to bypass the CFC for traditional money claims against the United States, such as presented by the classic Tucker Act scenario of an Indian breach of trust claim arising from government management of Native American assets. This Court has resisted extension of *Bowen* to new contexts. And, as discussed in a subsequent part of this brief, the Federal Circuit has established jurisdictional clarity in assignment

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statute, 28 U.S.C. § 1362, confers jurisdiction on the District Court.

of claims between federal courts, in a manner faithful to the specific ruling in *Bowen*.

In *Bowen v. Massachusetts*, the Court examined a challenge filed by the State of Massachusetts in District Court to the disallowance by the Federal Government of a reimbursement for certain health care expenditures under the matching payment provisions of the Medicaid statute, Title XIX of the Social Security Act, 42 U.S.C. §§ 1396-1396v. Although the Government challenged District Court authority under the APA, the Supreme Court majority held that the "money damages" exclusion in § 702 refers to claims seeking compensation for a loss. By contrast, the Court held, when money is "the very thing" to which a party is entitled, *Bowen*, 487 U.S. at 895, that money may be claimed in an action for specific relief under the APA:

> The State's suit to enforce § 1396b(a) of the Medicaid Act, which provides that the Secretary "shall pay" certain amounts for appropriate Medicaid services, is not a suit seeking money in *compensation* for the damage sustained by the failure of the Federal Government to pay as mandated; rather, it is a suit seeking to enforce the statutory mandate itself, which happens to be one for the payment of money.

Bowen, 487 U.S. at 900. *But see id.* at 913-14 (Scalia, J., dissenting) (relying upon a distinction in the common law between a money judgment, which is "damages," and a nonmonetary remedy, which

is "specific relief," to conclude that a claim for retrospective monetary relief is outside the scope of the APA); *see also Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210, 221 (2002) ("'Almost invariably * * * suits seeking (whether by judgment, injunction, or declaration) to compel the defendant to pay a sum of money to the plaintiff are suits for 'money damages,' as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of legal duty;'" quoting *Bowen*, 487 U.S. at 918-19 (Scalia, J., dissenting)).

In *Bowen*, the Court also rejected the Government's argument that § 704 of the APA barred judicial review because an alternative adequate remedy in the form of monetary relief was available against the United States in the then-Claims Court under the Tucker Act. *Bowen*, 487 U.S. at 901-08. Highlighting the special nature of the Medicaid financial participation arrangement between the Federal Government and the State of Massachusetts, the Court explained:

> [T]he nature of the controversies that give rise to disallowance decisions typically involve state governmental activities that a district court would be in a better position to understand and evaluate than a single tribunal headquartered in Washington. We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law. That policy applies with special force in this context because neither the Claims Court

> nor the Court of Appeals for the Federal Circuit has any special expertise in considering the state-law aspects of the controversies that give rise to disallowances under grant-in-aid programs. It would be nothing less than remarkable to conclude that Congress intended judicial review of these complex questions of federal-state interaction to be reviewed in a specialized forum such as the Court of Claims.

Bowen, 487 U.S. at 907-08. Moreover, the Court found it "anomalous to assume that Congress would channel the review of compliance decisions to the regional courts of appeals, see 42 U.S.C. § 1316(a)(3), and yet intend that the same type of questions arising in the disallowance context should be resolved by the Claims Court or the Federal Circuit." *Id.* at 908 (internal citation omitted).

Subsequently, in *Department of the Army v. Blue Fox*, 525 U.S. 255, 261-64 (1999), this Court unanimously reversed the extension of *Bowen* by one Court of Appeals to allow a subcontractor on a federal project to impose an "equitable lien" upon funds held by the United States. Holding that liens "are merely a means to the end of satisfying a claim for the recovery of money," the Court held this claim fell within the exclusion under the APA of actions for "money damages." *Id.* at 252-63. Thus, the Court recognized that lawsuits and devices that traditionally have been designed to recover money should be recognized for what they are in substance – money claims.

In sum, the Court in *Bowen v. Massachusetts* focused upon a dispute over an ongoing public welfare program arising from a unique Federal-State partnership relationship and held it was not well-suited for a Tucker Act suit in the CFC. The Court rejected what it called "the novel proposition that the Claims Court is the exclusive forum for judicial review" of Medicaid program disputes. *Bowen*, 487 U.S. at 883. Accordingly, the "most likely interpretation" of *Bowen* is that it does not "transfer matters traditionally within the exclusive jurisdiction" of the CFC. Cynthia Grant Bowman, Bowen v. Massachusetts: *The "Money Damages Exception" to the Administrative Procedure Act and Grant-in-Aid Litigation*, 21 Urb. Law. 557, 577-78 (1989) (arguing that *Bowen* should be limited to grant-in-aid programs); *see also Bowen*, 487 U.S. at 930 (Scalia, J., dissenting) (suggesting the courts "may have the sense" to "limit [the decision] to the single type of suit before us").

This Court has never suggested that traditional Tucker Act claims – government contract disputes, military employment claims, or Indian breach of trust claims involving management of Native American assets – could be diverted from the CFC to the District Court as purported claims for specific relief under the APA. *See Bowen*, 487 U.S. at 903 (describing the § 704 bar to judicial review when an adequate remedy lies elsewhere as "mak[ing] it clear that Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action").

C. Breach of Trust Claims Alleging Government Mismanagement of Indian Assets May be Adequately Remedied in the Court of Federal Claims and Thus Fall Outside the Scope of the Administrative Procedure Act for Judicial Review in District Court

1. The *Cobell* Case in the District of Columbia was an Unprecedented Projection of District Court Authority into the Province of the Court of Federal Claims over Indian Breach of Trust Claims

In 1996, a class action lawsuit on behalf of more than 300,000 Indians was filed as *Cobell v. Babbitt* in the United States District Court for the District of Columbia, alleging that the United States had failed to account for billions of dollars earned on oil and logging leases of millions of acres of land allotted to Indians in the last century but held in trust for them by the Federal Government. When the Government during discovery failed to turn over records for Indian trust accounts, the District Court took the extraordinary step of holding several leading officials, including the Secretary of the Interior, in contempt. *Cobell v. Babbitt*, 37 F. Supp. 2d 6, 38 (D.D.C. 1999). According to the District Court's findings, the Government has kept such poor records that it is incapable of determining what it owes each individual Indian or, for that matter, even which

individuals own which allotments. *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 6-12 (D.D.C. 1999).

The *Cobell* litigation is still pending many years later. In 2006, the Court of Appeals for the District of Columbia Circuit ordered the action assigned to a different judge. *Cobell v. Kempthorne*, 455 F.3d 317 (D.C. Cir. 2006). In 2009, the Court of Appeals remanded the case yet again to the District Court, overturning the District Court's ruling which had held that an accounting was not possible and ordered payment of $455 million as a "restitutionary award." *Cobell v. Salazar*, 573 F.3d 808, 809-10 (D.C. Cir. 2009). As of the date this brief was written, the *Cobell* accounting and asset administration claims had been settled for $1.4 billion, but congressional approval remained necessary. Cobell Settlement, at http://www.interior.gov/ost/cobell/index.html.

"Somewhat lost in the story of egregious government misconduct and adjudication of high-ranking government officials in contempt is the fact that the jurisdiction of the District Court – rather than the Court of Federal Claims – over the entire matter was doubtful and only possible through a generous reading of the *Bowen v. Massachusetts* decision." Sisk, *Tapestry*, *supra*, 71 Geo. Wash. L. Rev. at 661. The District Court in *Cobell* asserted authority over the matter under the APA, including the power to grant retrospective relief in the nature of an historical accounting of the accrued, past-due sums of

money that should be present in individual Indian trust accounts. But looking at the question with a "practical eye," *see New Mexico v. Regan*, 745 F.2d 1318, 1321 n.3 (10th Cir. 1984), the *Cobell* case is about *money* – how the Government was obliged as a fiduciary to safeguard it, how the Government mishandled it, to whom it is owed, and how much of it is due.

In *Cobell*, the District Court asserted the "crucial issue" was "whether the plaintiffs' requested retrospective remedy of an accounting is an equitable, specific claim, or whether it is simply a money damages claim in disguise." *Cobell v. Babbitt*, 30 F. Supp. 2d 24, 39 (D.D.C. 1998). In response to the Government's argument that the equitable accounting remedy was only the prelude to a request for monetary relief, the District Court declared that there was no evidence that the true nature of the plaintiffs' claims was to obtain eventual monetary reimbursement. *Cobell*, 91 F. Supp. 2d at 25-26. "At most," the court said, "the enforcement of this statutory right [to an accounting] may partially support some future monetary claim (but not necessarily 'money damages'), which, because this is plaintiffs' own money, will only be compensatory to the extent that the money is missing from the trust." *Id.* at 28.

Quoting *Bowen v. Massachusetts*, the court said that the plaintiffs sought "'the very thing to which they are entitled,' an accounting of their money that actually exists in the [Individual Indian Money] trust." *Cobell*, 91 F. Supp. 2d at 28. In a terse

paragraph, the D.C. Circuit upheld this holding with citation to *Bowen*, finding that the plaintiffs' request for an accounting constituted "specific relief other than money damages" which the District Court had authority to hear under the APA. *Cobell v. Norton*, 240 F.3d 1081, 1094-95 (D.C. Cir. 2001).

This holding opened the floodgates at the E. Barrett Prettyman Federal Courthouse in Washington, D.C. Dozens of suits alleging mismanagement by the Government of Indian assets and funds are pending before the District Court for the District of Columbia. *See Assiniboine & Sioux Tribes v. Norton*, 527 F. Supp. 2d 130 (D.D.C. 2007) (listing cases). In thirty-one instances, Indian tribes have filed pairs of breach of trust suits in both the CFC and in the District Court. Pet. App. 94a-99a.

2. When an Indian Tribe Alleges a Breach of Trust by the Government in Management of Assets, the Court of Federal Claims May Afford a More Than Adequate Remedy

This Court long has recognized the adequacy of a money judgment to remedy a meritorious claim of breach of trust by the government in its fiduciary responsibilities to Native Americans. In the *Mitchell* Indian breach of trust case, this Court described the Tucker Act remedy in the Court of Federal Claims as, not merely adequate, but superior to the alternative of a suit for specific relief in the District Court under

the APA. As the Court explained, a Tucker Act suit for retrospective damages caused by the Government's breach of its fiduciary duty to manage resources held in trust is essential because "prospective equitable remedies" available under the APA would be "totally inadequate" in deterring Government mismanagement and ensuring that Native Americans receive the proper value of the managed resources. *Mitchell*, 463 U.S. at 226-28.

In both the District Court and the CFC, the Tohono O'odham Nation alleges that the United States has breached fiduciary duties in managing three million acres of tribal land with valuable natural resources, maintaining accurate accounts of income derived from the land, and administering trust money held from legal judgments in favor of the tribe. Pet. App. 58a-67a, 74a-89a. In its District Court complaint, the Nation relied on the APA for a waiver of sovereign immunity, citing *Bowen v. Massachusetts* and *Cobell*. Pet. App. 78a-79a.

Along with dozens of similar complaints filed by other tribes at about the same time, the Nation's pending lawsuit in the District Court requests an historical accounting of trust accounts (among other remedies). As was true in the *Cobell* case, however, the Nation's claim ultimately is about money:

> The *Cobell* plaintiffs did not seek an accounting from the government because they value bookkeeping exactitude in the abstract or appreciate the intrinsic beauty of a well-prepared financial statement. Rather,

> they sought an accounting for the practical purpose of hastening the day that the government will be called to account for – that is, required to *pay* – the money that it has wrongfully withheld.

Sisk, *Tapestry*, *supra*, 71 Geo. Wash. L. Rev. at 664.

Like the "equitable lien" device that this Court refused to countenance under the APA in *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 262 (1999), the accounting of Native American trust accounts is "merely a means to the end of satisfying a claim for the recovery of money."

Even aside from the exclusion of claims for money damages under § 702 and the withdrawal of judicial review when an adequate remedy lies in another court under § 704, the APA is an uncertain source of authority for a freestanding cause-of-action to require the Government to prepare a comprehensive accounting of Indian trust assets. Before the District Court, the Tohono O'odham Nation insists that it possesses an independent cause of action in equity for an accounting that can be enforced outside of the APA, although the Nation still relies on the APA as a waiver of sovereign immunity. *See* Plaintiffs' Principal Brief in Opposition to Defendants' Motion to Dismiss (July 16, 2008). The Government argues that providing such an accounting is neither a discrete, non-discretionary, ministerial duty subject to review as "agency action" under §§ 702 and 706(1) nor "final agency action" subject to review under § 704. *See*

Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss (June 16, 2008).

Whichever party has the better of that argument, it is hardly surprising that a claim for an accounting of Indian trust assets does not fit comfortably under the APA. Instead, as this Court recognized a quarter-century ago, "Indians were to be given 'their fair day in court so that they can call the various Government agencies to account on the obligations that the Federal government assumed,'" by Congress's enactment of that specific waiver of sovereign immunity commonly known as the Indian Tucker Act. *Mitchell*, 463 U.S. at 214 (quoting 92 Cong. Rec. 5312 (1946) (statement of Rep. Jackson)); *see also* 5 U.S.C. § 702 (precluding APA review "if any other statute that grants consent to suit explicitly or implicitly forbids the relief which is sought").

In any case, an Indian trust dispute involving Government management of tribal assets will rarely, if ever, arise separately from existing financial harm, which may be remedied by a forthright claim for a retrospective money judgment for breach of that trust. And the Tohono O'odham Nation's lawsuit in District Court is not that rare case.

In the very first sentence of its District Court complaint, the Nation alleges "breaches of trust by the United States * * * in the management and accounting of trust assets, including funds and land." Pet. App. 74a. In the first paragraph, the Nation seeks not only an accounting but the "correct[ion of]

the balances of the Nation's trust fund accounts to reflect accurate balances." Pet. App. 75a. Indeed, the Nation asks the District Court for remedies of "disgorgement" and "equitable restitution," Pet. App. 91a-92a, that is, a transfer of money from the Government to the Nation. Thus, both the accounting and the other "equitable" remedies sought by the Nation are claims that can be adequately remedied by a money judgment and collateral relief available in the CFC under the Tucker Act and Indian Tucker Act.

Before both the Federal Circuit and this Court, in an attempt to distinguish the two lawsuits, the Nation contends that its complaint in District Court seeks "'the return of "old money" that belongs to the Nation but erroneously does not appear on its balance sheet,'" while its complaint in the CFC seeks "'damages in the form of "new money" that the Nation should have earned as profit but did not.'" Br. Opp. 25 (quoting Federal Circuit opinion, Pet. App. 13a-14a).

Whether or not this is an accurate description of the relief sought in the two complaints, this argument about what the dissenting judge below called "particular pots of money as different relief" (Pet. App. 23a) only reveals how far this case has digressed from basic principles of Tucker Act jurisdiction in the CFC. The CFC's authority does not turn on such dichotomies as old/new money, equitable/legal remedies, money damages/monetary relief, or specific/substitutionary relief. Plainly and simply, the CFC

may award money, regardless of label. *See* Pet. App. 52a-53a (Moore, J., dissenting) ("While it may be true that money damages is a different technical legal theory than equitable restitution or disgorgement, nonetheless the claim for money damages [in the CFC] can access the same pot of 'old money' that the equitable claims in the district court can access."); *see also* Nora J. Pasman-Green & Alexis Derrossett, *Twenty Years After* Bowen v. Massachusetts – *Damages or Restitution*, 69 La. L. Rev. 749, 761 (2009) (explaining that "most restitution claims result in a money judgment, which is satisfied by the same enforcement procedures as a damage award").

In short, if a money-mandating substantive law authorizes payment, the CFC has the power under the Tucker Act and Indian Tucker Act to enter a money judgment. As the CFC held below, "in this court, no distinction is to be found between money 'old' and 'new.' Rather, if successful, a plaintiff is made whole, to the extent possible, by the payment of money for the government's breaches of trust." Pet. App. 53a.

When a retrospective monetary remedy is available, it is "adequate" absent extraordinary circumstances, notwithstanding the unavailability of prospective or equitable remedies. "[A]sking for 'more' relief where monetary relief will satisfy the claimant's needs cannot defeat the jurisdictional scheme set up by Congress – to centralize money claims against the government, except those claims

under $10,000 and those sounding in tort, in the [Court of Federal Claims]." *Amoco Prod. Co. v. Hodel*, 815 F.2d 352, 367 (5th Cir. 1987).

In addition, under the Remand Act of 1972, "[t]o provide an entire remedy and to complete the relief afforded by the judgment," the CFC has authority "as an incident of and collateral to any such judgment" to "issue orders directing * * * correction of applicable records * * * to any appropriate official of the United States." 28 U.S.C. § 1491(a)(2); *see also* H.R. Rep. No. 92-1023 (1972) ("[W]hen the Court of Claims does have jurisdiction over any case before it, this bill will enable the court to grant all necessary relief in one action.") Thus, the CFC may both award a money judgment for mismanagement of Native American resources and, incident and collateral to that money judgment, order correction of the financial records and trust accounts maintained by the government. *Eastern Shawnee Tribe v. United States*, 582 F.3d 1306, 1308 (Fed. Cir. 2009) (saying the Court of Federal Claims "appears to have the authority to order an equitable accounting as ancillary relief"); *Yankton Sioux Tribe v. United States*, 84 Fed. Cl. 225, 234 (2008) ("[W]hen [a] plaintiff [in the CFC] requests monetary damages for breach of trust, plaintiff is, in substance, also asking for an accounting in support of that award.").

Even prior to the congressional grant of additional remedial authority ancillary to a money judgment, the CFC has had "the power to require an

accounting in aid of its jurisdiction to render a money judgment on that claim," and discovery in the CFC has been available to obtain government documents and records relevant to the claim. *See Klamath & Modoc Tribes v. United States*, 174 Ct. Cl. 483, 490-91 (1966); *see also* 28 U.S.C. § 2507 (authorizing CFC to "call upon any department or agency of the United States * * * for any information or papers, not privileged, for purposes of discovery or for use as evidence"); § 2521 (authorizing CFC to issue "subpoenas requiring the production of books, papers, documents or tangible things" and granting CFC the power to punish "contempt of its authority").

In sum, although supplemental to a monetary remedy, the CFC's power to demand a complete, detailed, and accurate accounting of the Nation's assets that the United States holds in trust should not be doubted. In any event, the APA does not remain available in the District Court whenever the alternative remedy afforded by Congress in another court is imperfect, awkward, or less than comprehensive; rather, the statute withdraws the power of judicial review under the APA when the alternative remedy in another court is "adequate."

D. With Nationwide Appellate Jurisdiction over Tucker Act Matters, the Court of Appeals for the Federal Circuit has Confirmed the Exclusive Jurisdiction of the Court of Federal Claims When a Claim may be Adequately Remedied by a Money Judgment

When the Court of Appeals for the Federal Circuit was created in 1982, Congress intended for it to exercise exclusive appellate jurisdiction over nontax Tucker Act claims in order "to provide reasonably quick and definitive answers to legal questions of nationwide significance." S. Rep. No. 97-275, at 3 (1981). Specifically, 28 U.S.C. § 1295(a)(3) grants jurisdiction to the Federal Circuit over all appeals from the Court of Federal Claims. Additionally, § 1295(a)(2) confers appellate jurisdiction upon the Federal Circuit over District Court decisions "if the jurisdiction of that court was based, in whole or in part, on section 1346[(a)(2)] of this title," that is, the Little Tucker Act.

In *United States v. Hohri*, 482 U.S. 64 (1987), this Court examined the comprehensive framework of the Federal Circuit's organic statute and noted the strong congressional expressions of the need for uniformity in the area of Tucker Act jurisprudence:

> A motivating concern of Congress in creating the Federal Circuit was the "special need for nationwide uniformity" in certain areas of the law. S. Rep. No. 97-275, p. 2

> (1981) (hereinafter 1981 Senate Report); S. Rep. No. 96-304, p. 8 (1979) (hereinafter 1979 Senate Report). The Senate Reports explained: "[T]here are areas of the law in which the appellate courts reach inconsistent decisions on the same issue, or in which – although the rule of law may be fairly clear – courts apply the law unevenly when faced with the facts of individual cases." 1981 Senate Report, at 3; 1979 Senate Report, at 9. The Federal Circuit was designed to provide "a prompt, definitive answer to legal questions" in these areas. 1981 Senate Report, at 1; 1979 Senate Report, at 1. Nontort claims against the Federal Government present one of the principal areas in which Congress sought such uniformity.

Hohri, 482 U.S. at 71-72.

In 1988, in the immediate aftermath of *Bowen v. Massachusetts*, Congress authorized an immediate interlocutory appeal by either the plaintiff or the government from a District Court ruling "granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under" 28 U.S.C. § 1631. Pub. L. No. 100-702, Title V, § 501, 102 Stat. 4642 (1988) (codified at 28 U.S.C. § 1292(d)(4)(A)). In this way, jurisdictional questions may be resolved at the outset of litigation, avoiding wasteful litigation on the merits in the wrong trial court. To "ensure uniform adjudication of Tucker Act issues in a single forum," the interlocutory appeal is

within the exclusive jurisdiction of the Federal Circuit. H.R. Rep. No. 100-889, at 52 (1988).

In *Consolidated Edison Co. v. United States Department of Energy*, 247 F.3d 1378, 1380-81 (Fed. Cir. 2001), nuclear utilities brought suit in District Court against the Federal Government challenging the constitutionality of statutory assessments against utilities for the Government's costs in decontaminating and decommissioning uranium processing facilities. The utilities sought a declaratory judgment that the statute was unconstitutional and an injunction against continued enforcement of the assessments. The Government moved to transfer the case to the CFC, asserting that adequate relief in the form of a refund of prior assessments would be available through the Tucker Act if plaintiffs were successful on the merits. After the District Court denied transfer and asserted authority under the APA, with citation to *Bowen v. Massachusetts*, the government took an interlocutory appeal to the Federal Circuit under 28 U.S.C. § 1292(d)(4). *Consol. Edison*, 247 F.3d at 1382.

The Federal Circuit concluded that the CFC could offer an adequate remedy, thus depriving the District Court of authority under the APA. *Consol. Edison*, 247 F.3d at 1380, 1382-86. Although the nuclear utilities may have avoided the "money damages" exclusion in § 702 of the APA by seeking only prospective relief, the District Court nonetheless was deprived of jurisdiction under § 704 of the APA because the CFC was empowered to provide an effective remedy. *Id.* at 1382-85. If the utilities were

successful in a suit for refund of previously paid assessments under the Tucker Act in the CFC, that judgment would operate by principles of res judicata to preclude the Government from continuing unlawful assessments in the future. Thus, because "[r]elief from its retrospective obligations will also relieve it from the same obligations prospectively," the CFC through a money judgment "can supply an adequate remedy even without an explicit grant of prospective relief." *Id.* at 1384-85.

With respect to *Bowen v. Massachusetts*, the Federal Circuit noted that the Supreme Court had "emphasized the complexity of the continuous relationship between the federal and state governments administering the Medicaid program." *Id.* at 1383. The Federal Circuit explained that when a case does not involve "a complex ongoing federal-state interface," the CFC may well be able to supply an adequate remedy through a money judgment. *Id.*

In subsequent decisions, the Federal Circuit has continued to affirm that "if a money judgment will give the plaintiff essentially the remedy he seeks – then the proper forum for resolution of the dispute is not a district court under the APA but the Court of Federal Claims under the Tucker Act." *Suburban Mortgage Assocs., Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 480 F.3d 1116, 1118 (Fed. Cir. 2007) ("[D]espite [the claimant's] valiant effort to frame the suit as one for declaratory or injunctive relief, this kind of litigation should be understood for what it is. At bottom it is a suit for money for which the Court of

Federal Claims can provide an adequate remedy, and it therefore belongs in that court."); *Christopher Village, L.P. v. United States*, 360 F.3d 1319, 1321 (Fed. Cir. 2004) (holding that a District Court does not have jurisdiction "to issue a declaratory judgment as to the government's liability for breach of contract solely in order to create a 'predicate' for suit to recover damages in the Court of Federal Claims").

In clarifying the state of the law pursuant to its national jurisdiction on Tucker Act matters, the Federal Circuit has specifically noted its disagreement with the federal courts in the District of Columbia. In *Eastern Shawnee Tribe v. United States*, 582 F.3d 1306, 1308-09 (Fed. Cir. 2009), the Federal Circuit cited to *Cobell*, stating: "The United States Court of Appeals for the District of Columbia Circuit – we think incorrectly – has nonetheless held that §§ 702 and 704 of the APA do not bar a suit in the district court for an equitable accounting and the award of monetary relief, though it has agreed that some forms of monetary relief are unavailable in the district court and must be sought in the Court of Federal Claims."

The Federal Circuit's message has been heard by some, but not all, judges in the District Court for the District of Columbia. In *Western Shoshone Nat'l Council v. United States*, 357 F. Supp. 2d 172, 176 (D.D.C. 2004), the court transferred Indian breach of trust claims for an accounting and monetary relief to the CFC, recognizing that the CFC had the power to conduct an accounting and award money. Citing the

Federal Circuit's *Consolidated Edison* decision, the court said that the tribe could "not cleverly circumvent jurisdiction of the Court of Federal Claims by asking for a declaratory judgment for an accounting which the [tribe] can then use to obtain money damages within the same suit." *Id.* at 176 n.7. But in *Osage Tribe v. United States*, 2005 WL 578171, at *2 (D.D.C. Mar. 9, 2005), the same judge who asserted APA authority over Indian breach of trust financial claims in *Cobell* cited that decision as establishing jurisdiction, denied a motion to transfer to the CFC, and chastised the Government, saying the court had "the dubious distinction of having heard these same arguments on multiple occasions."

And thus, jurisdictional disorientation persists.

II. THIS COURT SHOULD ADDRESS DUPLICATIVE LITIGATION AGAINST THE UNITED STATES BY CLARIFYING JURISDICTIONAL LINES AND DISCOURAGING ATTEMPTS TO BYPASS THE COURT OF FEDERAL CLAIMS WHEN A CLAIM FOR A MONEY JUDGMENT IS AVAILABLE

The Government contends that the Tohono O'odham Nation's breach of trust action filed in the Court of Federal Claims should be dismissed, because of the pendency of the Nation's parallel breach of trust action in the District Court, and that the Nation's action in the District Court should be dismissed on jurisdictional, sovereign immunity, and other grounds. The Nation responds that both the

CFC and the District Court lawsuits should be permitted to proceed along separate courses and result in two judgments. This amicus brief submits that the District Court lacks authority under the APA to hear the parallel lawsuit, that claims-splitting between these federal courts contradicts the congressional purpose to centralize monetary claims in the CFC and the Federal Circuit, and thus that the District Court action should be transferred to the CFC for unified adjudication under the Indian Tucker Act.[3]

If the analysis in this amicus brief is correct, then regardless whether the present CFC suit is dismissed under § 1500, another action arising from the same operative facts should be on its way to the CFC from the District Court through transfer under 28 U.S.C. § 1631 (confirmed if necessary by special interlocutory appeal to the Federal Circuit as provided in 28 U.S.C. § 1292(d)(4)). That transferred suit will then join or replace the present CFC suit. In the end, however winding may be the path, a single

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[3] The Government moved for a transfer to the CFC in one of the nearly identical claims by other Indian tribes which are pending along with the Tohono O'odham Nation's action in District Court in the District of Columbia. *See Osage Tribe v. United States*, 2005 WL 578171, at *2 (D.D.C. Mar. 9, 2005). However, the Government subsequently dismissed its appeal to the Federal Circuit, *Osage Tribe v. Norton*, No. 05-1383 (Fed. Cir. July 8, 2005) (Order), thereby pretermitting early resolution of the jurisdictional question by the appellate court designated by Congress. *See* 28 U.S.C. § 1292(d)(4).

lawsuit for breach of trust should remain in or arrive before the Court of Federal Claims.

Whether the § 1500 jurisdictional bar applies to an action in the CFC may not pivot directly on whether the simultaneously pending suit in another court is jurisdictionally viable in that court. *See Frantz Equip. Co. v. United States*, 98 F. Supp. 579, 580 (Ct. Cl. 1951). Nonetheless, the question of proper authority over the parallel lawsuit in the District Court is not extraneous to the § 1500 question in this particular context. By comparing the two lawsuits to determine whether they truly arise from the same underlying claim, the limits on District Court authority under the APA come into sharper relief. Moreover, when § 1500 is read in *pari materia* with other federal jurisdictional statutes like §§ 1631 and 1292(d)(4), the congressional policy expressed in these statutes is not only to abridge duplicative litigation against the federal government but to avoid dismissal of a viable lawsuit when the jurisdictional defect can be corrected by moving the litigation to the proper federal forum.

First, as this Court observed in *Keene Corp. v. United States*, 508 U.S. 200, 210 (1993), the § 1500 question "requires a comparison between the claims raised in the [CFC] and in the other lawsuit." Although the parallel District Court action is not directly before this Court on the grant of the writ of certiorari from the judgment of the Federal Circuit, the nature of the claims in the District Court are necessarily under examination in this Court because

the comparison of the pleadings is part-and-parcel of the § 1500 same "claim" analysis.

As the Federal Circuit and the Nation construe § 1500, whether the same "claim" underlies each action turns on the type of remedy requested in each court. Given that the District Court's authority under the APA is withdrawn under § 704 when an "adequate remedy" is available in another court, a comparison of the remedies sought in the District Court under the APA and in the CFC under the Tucker Act is revealing. In many respects, the debate between the parties on the nature of the claims and remedies being sought in the competing actions runs parallel to the underlying questions about whether the District Court has remedial authority to proceed under the APA or instead whether this matter falls exclusively under the purview of the CFC through the Indian Tucker Act.

Second, this Court should consider, not only how to interpret and apply § 1500 in this particular case, but how to discourage renewed contests arising from matching lawsuits in different federal courts for the future. "Nothing is more wasteful than litigation about where to litigate, particularly when the options are all courts within the same legal system that will apply the same law." *Bowen*, 487 U.S. at 930 (1988) (Scalia, J., dissenting).

Under some circumstances, filings in both the District Court and the CFC of duplicative or alternative lawsuits arising out of the same operative

facts may be difficult to avoid, making application of § 1500 unavoidable as well. In *Keene*, for example, a manufacturer of asbestos pursuant to government specification sought indemnification for liability to those alleging injury by a contract claim in the CFC and simultaneously sought indemnification or contribution by the United States in tort by a third-party complaint in District Court. *Keene*, 508 U.S. at 203-04, 216. Because the contract-based theory could be pursued only in the Court of Federal Claims under the Tucker Act and the tort-based theory could be pursued only in the District Court under the Federal Tort Claims Act, the claimant could not seek adequate relief in a single forum. Thus, the conflict between courts could not be easily avoided without putting the claimant to an election of legal theories/causes of action.

However, in the Indian breach of trust context, when the claim involves the Government's management of assets and funds, no jurisdictional conflict is necessary, and a rivalry between federal courts can be prevented. By clarifying that the proper forum for this type of claim is the Court of Federal Claims, this Court can prevent the recurrence of these jurisdictional disputes in the future.

CONCLUSION

By departing from established jurisprudence that Indian breach of trust claims involving the

Government's fiduciary administration of Native American assets and funds are to be brought in the Court of Federal Claims, the District Court for the District of Columbia created the conditions necessary for the present conflict over the operation of § 1500. If this Court confirms the traditional and exclusive jurisdiction of the CFC over Indian breach of trust claims that can be adequately remedied by a money judgment (and collatereal relief), then claimants will have no basis in the future for filing duplicative actions in multiple courts. For this category of Indian breach of trust cases, the § 1500 problem will evaporate.

The Government always has had the power to cut through the jurisdictional fog – and practically (if not formally) moot the § 1500 problem – by filing a motion under 28 U.S.C. § 1631 to transfer the parallel suit now pending in the District Court. Even if the District Court should deny the motion to transfer, the Government would be empowered to take an interlocutory appeal to the Federal Circuit under 28 U.S.C. § 1292(d)(4)(A). Because the Federal Circuit has already agreed that Indian breach of trust claims that can be remedied by a money judgment should be heard in the CFC, the transfer would be successfully accomplished.

With this Court's clarification of jurisdictional lines, the path to a single Tucker Act suit in the CFC would be revealed. Whether the present CFC action is dismissed under § 1500, is voluntarily dismissed by the Tohono O'odham Nation upon transfer of the

parallel District Court action, or is consolidated by the CFC together with the transferred District Court suit, the ultimate outcome here should be the same: a single lawsuit should go forward in a single forum, which is the Court of Federal Claims.

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Respectfully submitted,

GREGORY C. SISK
Counsel of Record
UNIVERSITY OF ST. THOMAS
SCHOOL OF LAW
1000 LaSalle Avenue
Minneapolis, Minnesota 55403
(651) 962-4923
gcsisk@stthomas.edu

Counsel for Amicus Curiae